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# Electoral Institutions in Bangladesh: A Study of Conflicts Between the Formal and the Informal

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Thesis submitted for the degree of PhD in Law

2015

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## **Abstract**

This thesis studies formal institutions, which are expected to ensure good electoral governance in Bangladesh, such as the Election Commission, the Judiciary and Parliament. The thesis shows how these constitutionally mandated bodies of accountability contribute to the weakening of the electoral regime through partisan law making and unequal rule application with an end to giving undue advantage to the executive of the day. The study relies on traditional theories of informal institutions such as patronage and clientelism to explain the weaknesses in formal institutions. Given the difficulties of democratic consolidation faced by Bangladesh, the thesis contends that the operative framework for studying elections and electoral institutions in Bangladesh must go beyond the sole study of the regulatory framework or of electoral corruption, to include *informal institutions and processes within formal institutions*. To understand the puzzle of weak electoral institutions and failing democratic consolidation in Bangladesh, and answer questions such as whose interests formal institutions are representing, what channels of influence are being used and why these channels exist, it is necessary to understand the actual existing social and power relations.

This research presents specific case studies to illustrate the consequences of phenomena including clientelism, patronage, corruption, dynastic politics, politicization and other informal behavior within formal institutions (along with formal regulatory weaknesses). The case studies demonstrate how these informal patterns weaken formal electoral institutions, resulting in partisan and personalized electoral laws and application of these laws. Partisan electoral laws and unequal application of the laws by different arms of the state in turn lead to political violence, which has serious consequences for democratic consolidation. The study is ethnographic and relies strongly on knowledge gained in the field. This research contributes to a deeper understanding of the relationship between formal law and informal institutions in Bangladesh.

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## Acronyms and Abbreviations

<b>ADAB</b>	Association of Development Agencies in Bangladesh
<b>ADP</b>	Annual Development Plan
<b>AL</b>	Awami League
<b>BAKSAL</b>	Bangladesh Krishak Sramik Awami League
<b>BEC</b>	Bangladesh Election Commission
<b>BNP</b>	Bangladesh Nationalist Party
<b>BRAC</b>	Bangladesh Rural Advancement Committee
<b>CEC</b>	Chief Election Commissioner
<b>CPD</b>	Centre for Policy Dialogue
<b>CTG</b>	Caretaker Government
<b>DU</b>	Dhaka University
<b>EC</b>	Election Commission
<b>ECP</b>	Election Commission Pakistan
<b>ECS</b>	Election Commission Secretariat
<b>EMB</b>	Election Management Body
<b>FEMA</b>	Fair Election Monitoring Alliance
<b>FBCCI</b>	Federation of Bangladesh Chambers of Commerce and Industry
<b>GDP</b>	Gross Domestic Product
<b>HC</b>	High Court
<b>HUJI-B</b>	Harkat-ul-Jihad-al-Islam- Bangladesh
<b>ICT</b>	International War Crimes Tribunal
<b>IDEA</b>	Institute for Democracy and Electoral Assistance
<b>JI</b>	Jama'at-i-Islami Party
<b>JMB</b>	Jama'atul Mujahideen Bangladesh
<b>JP</b>	Jatiyo Party
<b>JS</b>	Jatiyo Sangsad
<b>JSD</b>	Jatiyo Samajtantrik Dal
<b>LDP</b>	Liberal Democratic Party
<b>MoE</b>	Ministry of Establishment
<b>MP</b>	Member of Parliament
<b>NCG</b>	Neutral Caretaker Government
<b>NGO</b>	Non-governmental Organization
<b>RPO</b>	Representation of the People's Order 1972
<b>PPP</b>	Pakistan People's Party
<b>PSC</b>	Public Service Commission
<b>SC</b>	Supreme Court
<b>SHUJAN</b>	Shushashoner Jonno Nagorik
<b>TI</b>	Transparency International
<b>UN</b>	United Nations
<b>UNO</b>	Upazila Nirbahi Officer
<b>UP</b>	Union Parishad

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## Chapter 1 – Introduction

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### 1.1. Statement of the Problem

While practicing as a lawyer in Bangladesh, the researcher was involved in filing several writ petitions in relation to constitutionally protected institutions mandated to strengthen democracy and elections. These included writ petitions on the separation of the judiciary, the nature of the electoral rolls, the appointment of the Chief Election Commissioner, and the mandatory requirement of electoral candidates' to disclose certain information. What the researcher found was that the laws protecting democratic institutions in Bangladesh were for the most part in line with recommended practice by international organizations such as the Institute for Democracy and Electoral Assistance (IDEA) and Transparency International, and with the requirements of international legal commitments such as the United Nations Convention Against Corruption (UNCAC). Yet, these institutions of accountability, intended to strengthen elections and democracy, were weak and were contributing to the conflict over elections. Sitting in Dhaka, the researcher was in the midst of serious political violence and democratic breakdown in 2006<sup>1</sup> and realized that to understand Bangladesh's struggle with electoral politics, one needs to understand the *informal nature of formal institutions* in Bangladesh along with formal institutional weakness.

*Formal* institutions are hereby defined as 'controlling, organized organs of state'<sup>2</sup> embodied in constitutions, commercial codes, administrative regulations and laws, civil service procedures and judicial structures. Their features are readily observable through written documents, physical structures (e.g. ministry buildings, legislatures and

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<sup>1</sup> Following major pre-election violence, a state of emergency was declared in January 2007. An unelected, interim Caretaker Government governed the country for two years after until December 2008.

<sup>2</sup> Hans-Joachim Lauth, 'Informal Institutions and Democracy,' *Democratization* 7 (2000): 23.

courthouses), and public events (e.g. elections, parliamentary hearings, city council meetings and legal proceedings). The researcher defines *informal* institutions in the same vein as Guillermo O'Donnell, who notes that these institutions constitute of unwritten but 'regularized pattern of interaction that is known, practiced and accepted (if not necessarily approved) by actors who expect to continue interacting under the rules sanctioned and backed by that pattern'.<sup>3</sup> Informal institutions are based solely on the fact of their existence and their effectiveness. They are based on implicit and unwritten understandings. They reflect socio-cultural norms and routines, and underlying patterns of interactions among socioeconomic classes and ethnic groups. They are created, communicated and enforced outside of officially sanctioned channels.<sup>4</sup> These informal institutions and processes encourage politicized formal laws, politicized implementation of formal law and politicized formal institutions, thus giving rise to formal institutional weakness. This in turn creates a situation whereby formal institutions play a role in creating a more partisan electoral regime and promote personalized interests rather than public interest. The infiltration of the informal into formal processes has resulted in the Bangladesh Election Commission losing credibility, partisan electoral laws and a lack of faith in the judiciary as the bastion of justice. This has consequently resulted in the opposition parties' refusal to participate in elections unless held under the auspices of the 'Non-Party Caretaker' government.<sup>5</sup> This research is a study of the role of informal processes in creating partisan formal institutions in the context of democratization, focusing specifically on elections in Bangladesh.

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<sup>3</sup> Guillermo O'Donnell, 'Illusions about Consolidation', *Journal of Democracy* 7 (1996): 34.

<sup>4</sup> Michael Bratton, 'Formal versus Informal Institutions in Africa', *Journal of Democracy* 18 (2007): 96-110.

<sup>5</sup> This practice of refusal to participate in elections is known as the 'boycott' of elections in Bangladesh and constitutes of the wholesale withdrawal from the polls and instead moving to the streets to agitate.

According to most of the literature on law, elections, politics, democracy and governance in Bangladesh, the democratic era (1991-2014) has been marred by a widespread ‘governance crisis’, characterized by rampant corruption amongst politicians and public officials, including the judiciary and law enforcement agencies; escalating political violence and the use of ‘muscle politics’ through *mastaans* (political strongmen); marginal rule of law with access to justice being impaired by corruption and politicization of state agencies; regular disruptions to daily life through *hartals* (political strikes), curfews, and aggressive politics of the street; and the ensuing lack of civil rights, basic security and redress mechanisms from these jointly reinforcing illiberal phenomena, in the context of liberal democracy.<sup>6</sup> These elements are suggestive of deep-seated problems in Bangladesh’s style of governance, and have produced social tensions, a lack of equal access to justice, and abuses of human rights. These factors show that Bangladesh has not reached the habituation phase of democracy as defined by Rustow,<sup>7</sup> despite holding regular elections. In other words politicians and citizens have not yet become habituated to following democratic principles and do not yet have faith in the rules of democracy.

Most of the available literature on Bangladesh take a historical or path-dependent approach to the study of democratization and blame the democratic deficiency, bad governance and corruption issues on formal institutional weakness and traditions inherited from authoritarian rulers and colonialism. Those not using path-dependence to

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<sup>6</sup> See, Rehman Sobhan, ‘Structural Dimensions of Malgovernance in Bangladesh’, *Economic and Political Weekly*, 39 (2004): 4101-4108; Muhammad Mohabbat Khan, ‘State of Governance in Bangladesh’, *The Round Table*, 370 (2003): 391-405; Stanley Kochanek, ‘Governance, Patronage Politics and Democratic Transition in Bangladesh’ *Asian Survey* 40(2000): 530-50; Harry Blair, ‘Party Overinstitutionalization, Contestation and Democratic Degradation in Bangladesh’, *Handbook of South Asian Politics*, ed. Paul R. Brass (London: Routledge, 2010); Moazzem Hossain ‘Bangladesh: Home-Grown Democracy’, *Economic and Political Weekly*, 41 (2006); Rounaq Jahan, ‘Bangladesh in 2003: vibrant Democracy or Destructive Politics?’ *Asian Survey* 41(2004) 56-61; Nizam Ahmed, ‘From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973-2001)’, *Pacific Affairs* 76 (2003): 55-77 and Ferdous Afrina Osman, ‘Bangladesh politics: Confrontation, Monopoly and Crisis in Governance’, *Asian Journal of Political Science* 18 (2010): 310-333.

<sup>7</sup> Dankwart Rustow, ‘Transition to Democracy,’ *Comparative Politics* 1 (1970): 358.

understand the weaknesses in governance and democratization rely on the analysis of cultural gaps such as patronage, patrimonialism and clientelism.<sup>8</sup> Studies on electoral politics in Bangladesh have focused on the regulatory framework and a legal/technical analysis of the regulatory framework or on electoral corruption such as vote buying, bribery and muscle-politics.<sup>9</sup> This research studies formal constitutional bodies in charge of ensuring good electoral governance rather than the regulatory framework or corruption directly related to elections/election days. The thesis shows how constitutionally mandated bodies of accountability also contribute to the weakening of the electoral regime through partisan rule making and rule implementation. The study relies on traditional theories of informal institutions and patterns such as dynastic politics, patronage, clientelism and confrontational politics to explain the weaknesses in formal institutions. While the researcher does not disagree with the present literature in that traditions of informal institutions impede good governance and democratization, the research attempts to present a new method of studying informal institutions by using specific election related examples and showing how law making is affected by informal institutions.

This thesis seeks to fill a gap in literature by explaining weaknesses in electoral laws and law implementation in Bangladesh, as a consequence of weak institutions of accountability, which are further weakened because of the infiltration of informal processes that conflict with the functioning logic of formal institutions. The researcher presents specific examples that illustrate the phenomenon and consequences of informal processes within formal institutions in order to illustrate how these informal patterns weaken formal institutions protected by the constitution. The study is ethnographic and relies strongly on knowledge gained in the field, allowing for a firsthand presentation of

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<sup>8</sup> For an overview see, Kochanek, 'Governance, Patronage Politics and Democratic Transition in Bangladesh'.

<sup>9</sup> See Yeahia Akhter, *'Electoral Corruption in Bangladesh'* (Aldershot: Ashgate, 2001).

specific incidents of informal behavior within formal institutions in Bangladesh and the perceptions of local stakeholders. The research thereby contributes to a deeper understanding of the role of informal institutions within formal, constitutional frameworks and their consequences for elections and electoral law making.

The thesis concludes that formal institutions in Bangladesh are creating formal electoral rules, which do not meet the expected standards of liberal democracy. These standards go beyond holding regular elections and as a minimum standard requires effective opposition, rule of law, separation of powers and civil liberties (as discussed in Section 2.1.1.). A combination of formal institutional weakness and the existence of informal norms and patterns of behavior weakens formal institutions, making them partisan and having an affect on the type of laws enacted and how they are implemented. The result is that there is a lack of trust in democratic institutions such as the Election Commission, Parliament and the Judiciary. Lack of trust in formal institutions lead opposition political parties and their supporters to turn to the streets and to political violence in order to have their voice heard.

Elections in Bangladesh have been held regularly (every five years except during an emergency declared by the Caretaker Government between 2007-2008) since 1991. This dissertation is limited to a study of elections from 1991 onwards because it attempts to study informal patterns and weaknesses in the working of formal, constitutional bodies and laws rather than a study of extra-constitutional means of gaining power. From 1975 until 1991, changeover in power in Bangladesh was a result of coups, assassinations and other extra-constitutional means as will be illustrated in the historical overview provided below. The historical overview highlights how the overthrow of Ershad's authoritarian regime in 1991 marked the moment from when formal rules of the game began to matter in ways that they previously had not. Since 1991, Bangladeshi leaders have sought to

achieve their goals through the use of formal institutions rather than through coups, assassinations and other forms of violent overthrow. However, while using extra-constitutional means such as coups and assassinations are less likely, Bangladeshi politicians still attempt to use bribes, corruption and patronage as strategies to ensure constitutional access to power. Thus, since the 1990s, formal constitutional forums have usually been the channels by which Bangladeshi leaders come to power, but nevertheless there are informal strategies deployed in order to manipulate formal channels. This research is a study of the conflict between the functioning logic of the formal channels and the informal strategies. The author does not disagree with path-dependent explanations of formal institutional weakness in Bangladesh, but contends that there is a dearth of knowledge and therefore a necessity to study the effects of informal institutions, particularly in relation to law making and law implementation.

## 1.2. Historical Overview

Bangladesh has a long history of authoritarian, military-bureaucratic rule.<sup>10</sup> Prior to Bangladesh's war for independence in 1971, Pakistan was under military rule from 1958-1971.<sup>11</sup> The movement for autonomy for East Pakistan (now Bangladesh) arose after the general election of 1970, which was held under military rule.<sup>12</sup> In the 1970 general election of Pakistan, East Pakistan achieved a majority in the Federal Parliament. The Awami League headed by Sheikh Mujib won 160 out of the 162 general seats earmarked

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<sup>10</sup> For a detailed study of this period see, Ahmed Moudud, *Democracy and the Challenges of Development: A Study of Political and Military Interventions in Bangladesh* (Dhaka: Dhaka University Press, 1995).

<sup>11</sup> In 1958 there was a military coup led by General Ayub Khan. See, Habib Zafrullah and Yeahia Akhter, 'Military Rule, Civilianization and Electoral Corruption: Pakistan and Bangladesh in Perspective', *Asian Studies Review* 25, (2005) : 73-94.

<sup>12</sup> Pakistan held its first general election in 1970 on the basis of The Legal Framework Order issued on 30 March 1970 by the martial law regime of Yahya Khan. The Legal Framework Order called for direct elections for a unicameral legislature known as the National Assembly of Pakistan. The purpose of the National Assembly would be to frame the constitution after which it would dissolve automatically. The first constituent assembly of Pakistan had failed to draft a constitution in seven years and the 1962 Constitution drafted under the auspices of the Governor General Ghulam Muhammed was dissolved by Yahya Khan.



for East Pakistan. In West Pakistan, the leading political party, the Pakistan People's Party (PPP) led by Zulfikar Ali Bhutto, won 81 of the 138 general seats allocated to West Pakistan and the rest were divided amongst smaller parties.<sup>13</sup> This meant that the Awami League held the majority in the National Assembly. However, the PPP were unwilling to accept the Awami League and the Bengalis as the majority party in the Federal Parliament. Similarly, the military government did not want to accept Sheikh Mujib's Six Point Formula as a basis for the Constitution.<sup>14</sup> The military government at the time sided with the West Pakistani political parties and as a result Sheikh Mujib and the Awami League were never allowed to form a government.<sup>15</sup> The Awami League started a process of protest and non-cooperation in East Pakistan. The state machinery in Dhaka broke down and the military government launched a violent military operation on 25 March 1971.<sup>16</sup> Sheikh Mujib declared independence on 26 March 1971 (although there are strong disputes about when and by whom independence was actually declared, it is not necessary to illustrate those for the purpose of this thesis) and the 1971 war for independence against Pakistan lasted nine months. Thus, even before the nation was founded, Bangladesh struggled with elections, electoral politics and manipulation.

The Awami League restored the parliamentary system after independence for a brief period between 1972-1975 before a period of military-bureaucratic rule set in. Before the Bangladesh Constitution came into force on 16 December 1972, the country was governed *de jure* from 26 March 1971 and *de facto* from 16 December 1971 on the basis of three constitutional documents: the Proclamation of Independence 1971, Laws Continuance Enforcement Order 1971 and the Provisional Constitution of Bangladesh

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<sup>13</sup> Election Commission of Pakistan, <<http://ecp.gov.pk/GE.aspx>> (Accessed on 1 September 2015).

<sup>14</sup> Sheikh Mujib's Six Point Formula put forward six demands to end the exploitation of East Pakistan. For a detailed study of The Six Point Formula see, Syed Humayun, *Sheikh Mujib's Six Point Formula: An Analytical Study of the Break-up of Pakistan* (Karachi: Royal Books Co., 1995).

<sup>15</sup> Sonia Upreti, *Nationalism in Bangladesh* (New Delhi: Kalinga Publications, 2004) 43-44.

<sup>16</sup> For a detailed analysis see, Gary J. Bass, *The Blood Telegram* (London: Random House, 2013).

Order 1972. The Proclamation of Independence issued on 10 April 1971 declared that those who had been elected as representatives in the 1970 General Elections would form the Constituent Assembly for the purpose of framing the Bangladesh Constitution.<sup>17</sup> On the same day, alongside the Proclamation of Independence, the Laws Continuance Enforcement Order was issued, providing that, ‘all laws that were in force in Bangladesh on 25 March 1971, shall subject to the Proclamation aforesaid continue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent State of Bangladesh’.<sup>18</sup> On 23 March 1972, the Constituent Assembly of Bangladesh Order 1972 was promulgated and on 4 November 1972 the Constitution of Bangladesh was enacted by the Constituent Assembly (the researcher has had an opportunity to interview members of the Constituent Assembly during her field work. Please see appendix for interviews). The Constitution provided for a multi-party parliamentary form of government, separation of powers, fundamental rights and judicial review amongst other provisions. Bangladeshi constitutional expert and lawyer Abdul Halim writes that the original Constitution was ‘a well written and much improved constitution over all the existing constitutions of the sub-continent’.<sup>19</sup>

Following the adoption of the Constitution and the dissolution of the Constituent Assembly the first parliamentary election of Bangladesh was held on 7 March 1973. There were no candidates from political parties that had supported Pakistan during the 1971 war or religion based political parties as a result of the ban on political parties based on religion in the Constitution.<sup>20</sup> A total of fourteen political parties and 1078 candidates contested in the election, but the Awami League won overwhelmingly with 73.16 percent

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<sup>17</sup> The Proclamation of Independence, 10 April 1971, Mujibnagar, Bangladesh.

<sup>18</sup> Law Continuance Enforcement Order 1971.

<sup>19</sup> Abdul Halim, *Constitution, Constitutional Law and Politics: Bangladesh Perspective* (Dhaka: CCB Foundation, 2012) 111.

<sup>20</sup> Article 38, Constitution of Bangladesh. See also, Ali Riaz, *God Willing: The Politics of Islamism in Bangladesh* (New York: Rowman and Littlefield Publishers, 2004) 5.

of the popular vote, which gave it 293 of the 300 seats in the *Jatiyo Sangsad*.<sup>21</sup> However, soon after the win, the Awami League's popularity began to wane as a result of poor performance, its socio-economic policies, corruption and political patronage.<sup>22</sup> Sheikh Mujib attempted to counter opposition by amending the Constitution and establishing a single party system, triggering decades of constitutional manipulation and military rule.<sup>23</sup> Thus, began a trend of manipulation of the formal institutions in order to promote personalized interests of the political leadership. This PhD does not attempt to study formal and informal institutions during the authoritarian period.<sup>24</sup> Instead, it focuses on what is known as the 'democratic era' beginning in 1991, since which time elections have been held almost every five years and the executive have not openly resorted to extra-constitutional means in order to retain power. However, the period between independence and the beginning of sustained parliamentary democracy was instrumental in forming the political and legal structure in Bangladesh. The following subsections will attempt to illustrate the historical developments that helped consolidate informal processes within the formal institutions of the state.

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<sup>21</sup> <[http://www.ecs.gov.bd/English/MenuTemplate1.php?Parameter\\_MenuID=9&ByDate=0&Year=>](http://www.ecs.gov.bd/English/MenuTemplate1.php?Parameter_MenuID=9&ByDate=0&Year=>) (Accessed on 1 September 2015). The Jatiyo Sangshad is the National Parliament of Bangladesh.

<sup>22</sup> See generally, Rounaq Jahan, 'Bangladesh in 1973: Management of Factional Politics', *Asian Survey* 14 (1974) 125-135.

<sup>23</sup> David Lewis, *Bangladesh: Politics, Economy and Civil Society* (Cambridge: Cambridge University Press, 2011) 81.

<sup>24</sup> For an account of patronage and other informal institutions in this period, please see, Ayesha Jalal, *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* (Cambridge: Cambridge University Press, 1995). Jalal argues that politics, authoritarianism and patronage in South Asia are the result of a historically constituted institutional legacy that was bequeathed by colonial rule and whose roots lay in events that took place well before partition and independence.

### *1.2.1 Constitutional Amendments and the Suspension of Democracy*

The Constitution was amended four times within three years of coming into force.<sup>25</sup> The first three amendments dealt with prosecution of war criminals, emergency and the suspension of fundamental rights, preventive detention, and gave effect to the boundary-line agreement with the Government of India respectively. While the first three amendments were seen as necessary the fourth amendment was seen as ‘a radical assault to (the parliamentary) system of government.’<sup>26</sup> It sought to establish a Presidential system of government with a President elected by direct election, for a fixed term of office, with a Vice-President appointed by the President, with a Council of Ministers to aid and advise the President and with a Parliament unable to remove the President or to bring about the fall of the Council of Ministers’.<sup>27</sup> Thus, the first attempt at manipulating formal institutions for partisan and personalized reasons took place, and changes to the Constitution consolidated power strongly in the hands of the President.

The manner in which the fourth amendment was passed in 1975 was arguably dubious. On 28 December 1974, emergency was declared in Bangladesh on the basis that a group of people who were opposed to the independence of Bangladesh were working on various subversive activities which were getting in the way of political stability and economic progress.<sup>28</sup> Twenty-seven days after the emergency was proclaimed, on 25 January 1975 the Fourth Amendment Bill was introduced in Parliament and passed within half an hour without any discussion or debate (the fourth amendment has since then been repealed).<sup>29</sup> Similar use of large majorities in parliament to pass partisan

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<sup>25</sup> Chapter five of this dissertation provides a detailed study of the constitutional amendment process and the politicization of constitutional amendments in the democratic era.

<sup>26</sup> Mostofa Kamal, *Bangladesh Constitution: trends and Issues* (Dhaka: Dhaka University Press, 1994) 37.

<sup>27</sup> Kamal, *Bangladesh Constitution: trends and Issues*, 37.

<sup>28</sup> Halim, *Constitution, Constitutional Law and Politics: Bangladesh Perspective*, 112.

<sup>29</sup> For a fuller account see, Moudud Ahmed, ‘*Bangladesh: Era of Sheikh Mujibur Rahman*’, (Dhaka: University Press Limited, 1983) 235.

amendments in order to increase executive powers has been utilized in the democratic era since 1991 and is discussed in Chapter four. Through the fourth amendment, Sheikh Mujibur Rahman attempted to introduce one party rule by dissolving all political parties (including Awami League), except for what would be known as BAKSAL (Bangladesh Peasants, Workers and People's League).<sup>30</sup> According to many observers, including Jalal and Davis, this was an attempt to build new alliances with small peasants and workers because the patronage relationships with other classes such as the bureaucrats, the military and other political groups upon which the Awami League had depended had begun to deteriorate.<sup>31</sup> The fourth amendment made provisions for a one party state through insertion of Part VI A to the Constitution. The Parliamentary form of government ceased to exist and instead a Presidential form of government was introduced but without the usual checks and balances. The fourth amendment made the impeachment and removal of the President unprecedentedly difficult by requiring a three-fourths majority. This is when even constitutional amendments required a two-third majority. The President also received absolute power of veto and therefore was placed above the Parliament. The Fourth amendment took away the Supreme Court's power to enforce fundamental rights and Supreme Court judges became removable by the President on grounds of conduct and incapacity. The amendment also empowered the President with the appointment of Supreme Court judges without having to consult the Chief Justice. The Supreme Court also ceased to have control over the subordinate judiciary, which now came directly under the control of the President. Finally, the fourth amendment provided for a single national party in the state. According to Article 117A of part VIA, the President could direct that there should be only one political party in the

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<sup>30</sup> Muhammad Rashiduzzaman, 'Changing Political Patterns in Bangladesh: Internal Constraints and External Fears,' *Asian Survey* 17 (1977) 795.

<sup>31</sup> Jalal, *Democracy and Authoritarianism in South Asia*; and Lewis, *Bangladesh: Politics, Economy and Civil Society*, 77.

state. Once the President made an order for one party under Article 117A the following applied:

- i. All political parties of the state would stand dissolved and the President would take all necessary steps for the formation of the National Party.
- ii. The President by an order would determine all matters relating to the nomenclature, programme, membership organization, description, finance and function of the National Party.
- iii. Once the National Party was formed each member of the Parliament would have to join the party within a time fixed by the President; otherwise he would cease to be a member of Parliament and his seat would become vacant.<sup>32</sup>

In accordance with the above provisions, Sheikh Mujib declared the formation of BAKSAL and dissolved all existing political parties. Following this, all newspapers were banned except four newspapers owned and managed by the state.<sup>33</sup> Thus, Bangladesh began its journey as an independent nation with an attempt to recast electoral politics into a one party state in order to maintain the patronage support upon which political parties and politicians were dependent. In 1975 the government was overthrown by a violent military coup and Sheikh Mujib and most members of his family were assassinated. Following the violent overthrow of Sheikh Mujib's regime, Bangladesh entered a long phase of authoritarian rule.<sup>34</sup> As Ahmed writes, Bangladesh entered a new era of 'the consolidation and institutionalization of military rule'.<sup>35</sup> Thus, the manipulation of formal institutions and processes in order to make room for informal institutions has been present throughout the history of Bangladesh.

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<sup>32</sup> Article 117 A, Constitution of Bangladesh (repealed).

<sup>33</sup> Talukder Maniruzzaman, 'Bangladesh in 1975: The Fall of the Mujib Regime and Its Aftermath' *Asian Survey* 16 (1976) 121.

<sup>34</sup> Rashiduzzaman, *Changing Political Patterns in Bangladesh*, 796.

<sup>35</sup> Ahmed, 'Politics in Bangladesh: The Paradox of Military Intervention', *Regional Studies* 1 (1990): 45.

### 1.2.2. *The Authoritarian Years*

Following the assassination of Sheikh Mujib on 15 August 1975, on 20 August 1975 the Constitution was made subordinate to the Martial Law Proclamation and Khondakar Mushtaque Ahmed, a member of Mujib's cabinet, took over as President.<sup>36</sup> On 8 November 1975, after a second coup, a second Martial Law was proclaimed by Chief Justice Abu Sadat Mohammed Sayem.<sup>37</sup> Justice Sayem, in a unique and disturbing move, assumed power as President and Chief Martial Law Administrator. Although Justice Sayem was the acting President, it was the junior officers of the army and the leaders of the coup who issued instructions and orders from the President's house. Ziaur Rahman (Zia), an army general, who replaced Justice Sayem as Chief Martial Law administrator in 1976, became the de facto ruler of Bangladesh.<sup>38</sup> On 21 April 1977, Zia, a leading figure during the 1971 war of independence, replaced Justice Sayem as President following Sayem's retirement. In September 1978, Zia formed his Bangladesh Nationalist Party and became its chairman. Following this, in November 1978, the 1976 Political Parties Regulation Order was repealed. This lifted the ban on many political parties such as the Communist Party of Bangladesh (CPB), the Democratic League (DL) and the Jatiyo Samajtantric Dal (JSD) and some of the Islamic parties that had opposed the secession of Bangladesh from Pakistan.

Zia held a referendum to hold office on 30<sup>th</sup> May 1977. According to Haque and Hakim, the referendum was an attempt to weaken political opposition and acquire legitimacy.<sup>39</sup> However, the overwhelming number of affirmative votes (98.88%) and the extremely high voter turnout (88.3) figures were seen to be inflated and failed to give Zia the

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<sup>36</sup> Maniruzzaman, *Bangladesh in 1975*, 123.

<sup>37</sup> Maniruzzaman, *Bangladesh in 1975*, 124.

<sup>38</sup> Ahmed S. Huque and M. A. Hakim, 'Elections in Bangladesh: Tools of Legitimacy', *Asian Affairs: An American Review* 19 (1993): 250.

<sup>39</sup> Huque and Hakim, 'Elections in Bangladesh: Tools of Legitimacy', 251.

legitimacy he sought.<sup>40</sup> Following the referendum, on 3 June 1978 Zia held a Presidential election. His candidacy was backed by a six party alliance named the National Front. The opposition alliance, called the Democratic United Front, backed General Osmany, the supreme commander of the Bangladesh armed forces and also a former member of Mujib's cabinet. Zia won overwhelmingly (76.67%) and was elected as President. Later in the same year, Zia formed the Bangladesh Nationalist Party. The Bangladesh Nationalist Party included political leaders from all ideological backgrounds, all those who opposed the Awami League and anyone who had become dissatisfied or disillusioned by Mujib's government. It has been argued that the Bangladesh Nationalist Party was created as 'a hegemonic party of parties hastily organized around Zia and was intended to be used as his political platform'<sup>41</sup> and that Zia essentially restored the bureaucratic military state that had been constructed by Pakistan between 1958 and 1969.<sup>42</sup> Zia held parliamentary elections in 1979 to civilianize his military rule and the Bangladesh Nationalist Party won 207 of the 300 seats. In May 1981, Zia was killed in an abortive coup.

Following Zia's death, the Vice-President, Justice Abdus Sattar, took over as acting President. In the presidential elections held in November 1981 he was given his mandate. However, in March 1982 following a bloodless coup the government was removed from power and Lieutenant H.M. General Ershad took over as Chief Martial Law Administrator (Ershad now heads the Jatiyo Party, the third most popular political party in Bangladesh, and the researcher was able to interview General Ershad as part of the field work for this dissertation). Like Zia, Ershad took steps to civilianize his regime by forming a political party. The Janadal was formed in 1983 and renamed as the Jatiyo

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<sup>40</sup> Huque and Hakim, 'Elections in Bangladesh: Tools of Legitimacy', 250.

<sup>41</sup> Huque and Hakim 'Elections in Bangladesh: Tools of Legitimacy', 251.

<sup>42</sup> See generally, Stanley Kochanek, 'Patron Client Politics and Business in Bangladesh', *Sociological Bulletin* 44 (1995): 115-17.



Party in 1986. While Ershad is seen to have been successful in keeping the army under control,<sup>43</sup> he was less successful than Zia in quelling opposition to the military regime.

From 1983 onwards the Awami League and its Fifteen Party Alliance and the Bangladesh Nationalist Party and its Seven Party Alliance started demanding the withdrawal of military rule, parliamentary elections and the return of representative government. In January 1985, Ershad announced that parliamentary elections would be held on 6<sup>th</sup> April 1985.<sup>44</sup> However, opposition parties refused to participate in elections held under martial law, starting the trend of electoral boycotts. In order to quell opposition, both Sheikh Hasina, the leader of the Awami League and Khaleda Zia, the leader of the Bangladesh Nationalist Party, were placed under house arrest and Ershad held a public referendum on 21 March 1985 to support his Presidency.<sup>45</sup> While the regime claimed a voter turnout of 72 percent and an affirmative vote of 94.14 percent, both local and foreign observers stated the figures were inflated and voter turnout could not have been more than 15 to 20 percent.<sup>46</sup>

The government held parliamentary elections in 1986. While both major opposition parties, the Awami League and the Bangladesh Nationalist Party, had initially refused to participate, the Awami League in a surprising move joined the election at the last minute.<sup>47</sup> The Awami League did very well in the elections and won 76 seats while Ershad's Jatiyo Party won 153 seats (see Table 2). However, the 1986 elections could not stop the anti-regime agitations.<sup>48</sup> The Awami League accused the Jatiyo Party of rigging the elections and the Bangladesh Nationalist Party did not even participate because they

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<sup>43</sup> Lewis, *Bangladesh: Politics, Economy and Civil Society*, 85-90.

<sup>44</sup> *Europa World Yearbook 2004: Afghanistan - Jordan*, Vol 1 (New York: Europa Editions, 2004) 681.

<sup>45</sup> *Europa World Year Book 2004*, 681.

<sup>46</sup> Peter J. Bertocci, 'Bangladesh in 1985: Resolute Against the Storms,' *Asian Survey* 26 (1986): 229.

<sup>47</sup> *Europa World Year Book 2004*, 681.

<sup>48</sup> Huque and Hakim, *Elections in Bangladesh*, 56.

felt the elections would not be free and fair. The third parliament suffered from serious lack of confidence by opposition parties. Opposition agitation eventually compelled Ershad to dissolve parliament on 6 December 1987 and set 3 March 1988 as the date for a fresh election.<sup>49</sup> However, all major opposition parties refused to participate in the fresh election and declared a total boycott of the elections.<sup>50</sup> The controversy surrounding the two elections and failure to convince opposition parties to participate further eroded Ershad's legitimacy.<sup>51</sup> Thus, began the end of the authoritarian years and the first steps towards the 'democratic era', which is still riddled with 'boycott' and refusals to participate in the electoral process and Parliament. Table 1 shows the political system in place and the Parliaments from 1972-2015.

**Table 1: Political Systems and Parliaments, 1972-2015**

Parliament	Elected (Year)	Political System Elected Majority Party Head of Government	Tenure (Months)
<b>1972-1974: Parliamentary Democracy</b> <i>Provisional Constitutional Order 1972</i> <i>Bangladesh Constitution 1972</i>			
First	1973	<b>Awami League</b> Sheikh Mujibur Rahman, Prime Minister	30
<b>January 1975: Presidential Form of Government</b> <i>4<sup>th</sup> Amendment to the Constitution introducing One Party System (BAKSAL)</i> Sheikh Mujibur Rahman, President			
<b>1975-1981: Military Rule (Presidential Form of Government)</b> Army Chief of Staff Major General Ziaur Rahman			
Second	1979	<b>Bangladesh Nationalist Party</b> Ziaur Rahman, President	35
<b>1981-1982: Civilian Rule (Presidential Form of Government)</b> Justice Abdus Sattar, Acting President			
<b>1982-1990: Military Rule (Presidential Form of Government)</b> Army Chief of Staff Lt. General Hossain Mohammed Ershad, President			
Third	1986	<b>Jatiya Party</b> Hossain Mohammed Ershad, President	17
Fourth	1988	<b>Jatiya Party</b> Hossain Mohammed Ershad, President	31
<b>1991: Restoration of Parliamentary Democracy</b>			

<sup>49</sup> *Europa World Year Book 2004*, 681.

<sup>50</sup> *Europa World Year Book 2004*, 681.

<sup>51</sup> Ershad attempted to popularize his regime through constitutional amendment making Islam the state religion. See, Lewis, *Bangladesh: Politics, Economy and Civil Society*, 85-90.

Fifth	1991	<b>Bangladesh Nationalist Party</b> Khaleda Zia, Prime Minister	56
Sixth	1996	<b>Bangladesh Nationalist Party</b> Khaleda Zia, Prime Minister	(12 days)
Seventh	1996	<b>Awami League</b> Sheikh Hasina, Prime Minister	60
Eighth	2001	<b>Bangladesh Nationalist Party</b> Khaleda Zia, Prime Minister	60
<b>2007-2008: Military-back Caretaker Government</b>			
Ninth	2009	<b>Awami League</b> Sheikh Hasina, Prime Minister	60
Tenth	2014	<b>Awami League</b> Sheikh Hasina, Prime Minister	15 and counting

Source: CPD-CMI Working Paper 2, The Parliament of Bangladesh: Representation and Accountability and [www.parliament.gov.bd](http://www.parliament.gov.bd) (Latest calculations by researcher).

By 1990, political parties, including the Bangladesh Nationalist Party and the Awami League, united to fight President Ershad's ten-year authoritarian rule and bring back democracy.<sup>52</sup> The movement against Ershad reached its height in November 1990 when the opposition alliance, consisting of the Bangladesh Nationalist Party, the Awami League, the Jamaat-e-Islami and other smaller parties and alliances, gave a joint declaration stating that they would boycott and resist any elections under the present regime and that they would only join polls to elect a Parliament under a caretaker government headed by a 'non-partisan and neutral person who will not be associated with any political party directly or indirectly, and he will not contest the elections of President, Vice-President or Parliament. No minister of his caretaker government will participate in any election.'<sup>53</sup> Ershad's government was unable to resist this demand, and Shahbuddin Ahmed, the Chief Justice at the time, was handed power in accordance with Article 50 of the Constitution. This was possible because Shahbuddin Ahmed replaced

<sup>52</sup> Talukder Maniruzzaman, 'The Fall of the Military Dictator: 1991 Elections and the Prospect of Civilian Rule in Bangladesh', *Pacific Affairs* 65 (1992): 206-207.

<sup>53</sup> Giasuddin Molla, 'Democratic Institution Building Process in Bangladesh: South Asian Experience of a New Model of a Caretaker Government', *Heidelberg Papers in South Asian and Comparative Politics*, 3 (2003).

the incumbent Vice President. He then assumed the presidency after Ershad resigned.<sup>54</sup> Shahbuddin Ahmed then formed a caretaker government in order to hold a national election. However, this was thought to be a one-off solution at the time and no such provision was enacted into the Constitution. Parliamentary Elections were held on 27 February 1991, and were generally observed to be free and fair.<sup>55</sup>

### ***1.2.3. Electoral Politics in the Democratic Era***

Elections in Bangladesh have been held every five years since 1991 until 2006. This is known as the ‘democratic era’ in Bangladesh. The democratic era harbored the birth of as many as 150 political parties in Bangladesh, although most are currently politically inactive. During the 9<sup>th</sup> Parliamentary election held in December 2008, the Election Commission registered only 38 parties out of the 130 that had applied for registration, because most did not meet the requirements for registration.<sup>56</sup> Despite the existence of these parties, the main rivalry over power is restricted to a handful of parties (See Table 2). Mostofa and Bhuiyan blame the small number of parties actually vying for power in Bangladesh as the reason that ‘render(s) the competition acerbic’<sup>57</sup> between the two major parties vying for power (the rivalry between these two parties is discussed in depth in Section 2.4). Since the fall of Ershad’s regime, power has altered between the Bangladesh Nationalist Party, the Awami League and their respective alliances (until 2014 when the Awami League received a second consecutive term in power). The Jatiyo Party and the Jamaat-e-Islami also gain a few seats and have formed alliances with the

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<sup>54</sup> Habib Zafrullah and Yeahia Akhter, Non-Political Caretaker Administrations and Democratic Elections in Bangladesh: An Overview, *Government and Opposition*, 35 (2014): 351.

<sup>55</sup> Zafrullah and Akhter, Non-Political Caretaker Administrations and Democratic Elections in Bangladesh, 354.

<sup>56</sup> Interview A11; The requirements that need to be met for registration as listed in Article 90B(a) of the Representation of the People’s Order 1972 is that the political party must have a Central Committee, Committees in at least 21 districts and 100 Upazilas, each of which must have at least 200 members.

<sup>57</sup> Golam Mostofa and Shahjahan Bhuiyan, ‘Overcoming Electoral Corruption: The Case of Bangladesh’, *Money, Corruption and Political Competition in Established and Emerging Democracies*, ed. Jonathan Mendilow (Plymouth: Lexington Books, 2012) 186.

Bangladesh Nationalist Party (both Jatiyo Party and Jamaat-e-Islami have formed alliances with the Bangladesh Nationalist Party in 2001) and the Awami League (Jatiyo Party joined the Awami League alliance in 2008). Elections since 1991 until 2008 were held under what is known in Bangladesh as the ‘Non-Party Caretaker Government’, an unelected interim government usually headed by a former Chief Justice. The Caretaker Government system was first initiated under the Ershad regime when political parties refused to join parliamentary elections held in 1988 and the 1991 elections were held under a Caretaker Government, although at the time the Caretaker government was seen as a temporary solution to transit into parliamentary democracy.

**Table 2: Party Composition and Electoral Performance of First to Tenth Parliaments**

Parliament	Vote Share of Ruling Party (%)	Ruling Party/ Ruling Coalition	Election Performance of the Government and Opposition: Number of Seats		
			Govt. MPs	Opposition MPs	Independent MPs
First	73.2	AL	292	2	5
Second	41.2	BNP	207	77	16
Third	42.3	JP	153	115	32
Fourth	N/A	JP	251	24	25
Fifth	30.8	BNP	158	139	3
Sixth	92.7	BNP	N/A	N/A	N/A
Seventh	37.4	AL	179	120	1
Eighth	47.2	BNP	216	78	6
Ninth	57.1	AL	262	34	4
Tenth	N/A	AL	245	34 (JP was also part of the AL-led alliance)	16

Source: [www.parliament.gov.bd](http://www.parliament.gov.bd), <http://www.ipu.org/parline-e/reports/2023.htm>, Ahmed (2003) and Ahmed (2011), Updated calculations by the author

Notes: 1. Opposition is MPs of parties not supporting the government or government coalition except for the 2014 election when JP, an AL ally, formed the opposition after the election.

2. Government MPs include all MPs of government coalitions.

3. Women’s reserved seats which are indirectly elected are not included.

4. The BEC website has not updated vote share for 2014 nor was this information available via election monitoring reports as international and local observers were not deployed as the credibility of the election was in question.

The Bangladesh Nationalist Party formed the first democratically elected government

since 1973 in 1991, but within a few years of its tenure the Awami League and other opposition parties began to accuse it of manipulating the electoral process and institutions.<sup>58</sup> Bangladesh faced a serious political crisis for two years from 1994. The political deadlock that ensued began in March 1994 with the Magura Parliamentary by-election. The main opposition party, the Awami League, along with the Jatiyo Party and Jamaat-e-Islami, charged the Bangladesh Nationalist Party government with vote rigging and began a movement for the appointment of a neutral Caretaker Government to supervise new elections and insertion of a Caretaker Government provision for elections into the Constitution.<sup>59</sup> According to Article 123 of the Constitution, new elections would have to be held in February 1996. To press home their demand, the opposition parties boycotted Parliament *en masse* and enforced a series of *hartals* (nationwide strikes).<sup>60</sup> When the Bangladesh Nationalist Party government continued to refuse to budge on the Caretaker Government issue, naming the demand undemocratic and unconstitutional, all 147 members of Parliament of the three opposition groups resigned on 28 December 1994.<sup>61</sup> The Bangladesh Nationalist Party dissolved Parliament in November 1995 and planned to hold elections within 90 days of the dissolution as per Article 123 of the Constitution, despite threats of opposition boycott of the elections unless a neutral Caretaker Government was put in place via a constitutional amendment.<sup>62</sup>

On February 15, 1996 parliamentary elections were held without the participation of any major opposition parties. The elections resulted in a landslide victory for the Bangladesh Nationalist Party, which won 289 of the 300 seats. However, voter turnout was less than

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<sup>58</sup> Molla, 'Democratic Institution Building Process in Bangladesh', 10.

<sup>59</sup> Golam Hossain, 'Bangladesh in 1994: Democracy at Risk' (1994), 35 *Asian Survey* 172.

<sup>60</sup> *Europa World Year Book 2004*, 682.

<sup>61</sup> *Europa World Year Book 2004*, 682.

<sup>62</sup> Stanley Kochanek, 'Bangladesh in 1996: The 25th Year of Independence' *Asian Survey* 37 (1996) 136.

15% of the eligible electorate, and it is thought by most analysts and independent observers that the Bangladesh Nationalist Party engaged in massive vote rigging.<sup>63</sup> The elections were reminiscent of those held under previous authoritarian rulers in Bangladesh. The failure of the election added fuel to the opposition demand for the creation of a neutral Caretaker Government to conduct elections, and the opposition parties declared an indefinite non-cooperation movement beginning on March 9, 1996.<sup>64</sup>

The Awami League led non-cooperation movement gained support from different sectors such as NGOs and the business community and succeeded in forcing the Bangladesh Nationalist Party to give in to the opposition demand for elections to be held under a 'Non-Party' Caretaker Government. On 26 March 1996 the Bangladesh Nationalist Party government passed the 13th Amendment Bill. The 13<sup>th</sup> amendment provided for the appointment of a 'Non-Party Caretaker Government' 90 days prior to elections, with the mandate to hold elections. The last retired Chief Justice, who would also appoint ten advisors, would head the Caretaker Government. Bangladesh held four successful parliamentary elections with an alternation of power at each election in 1991, 1996, 2001 and 2008 under the Caretaker Government system. In 2006, the electoral process faced its first serious breakdown since the insertion of a provision for a Caretaker Government in the Constitution in 1996.

The 2006 crisis can be traced back to 2004 when the Bangladesh Nationalist Party government of 2001-2006 passed the 14<sup>th</sup> amendment to the Constitution on 16 May. The 14<sup>th</sup> Amendment raised the retirement age of judges from 65 to 67 years. According to the 13<sup>th</sup> Amendment, which provided for a 'Non-Party Caretaker Government',<sup>65</sup> the

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<sup>63</sup> Molla 'Democratic Institution Building Process in Bangladesh', 6.

<sup>64</sup> *Europa World Year Book 2004*, 682.

<sup>65</sup> Chapter IIA, Non-Party Caretaker Government, Constitution of the People's Republic of Bangladesh. (Chapter IIA was repealed in 2011).

President would choose the last retired Chief Justice as the Chief Advisor.<sup>66</sup> By raising the retirement age of judges, Khondaker Mohammad Hasan would become the last retired Chief Justice before the next parliamentary election and could be appointed as the head of the Caretaker Government, leading to accusations that the 14<sup>th</sup> amendment was passed for the Bangladesh Nationalist Party's partisan gain. Justice Hasan was accused of being inclined towards the Bangladesh Nationalist Party due to past associations. The Daily Star (the highest circulating English language daily in Bangladesh) reported that Justice Hasan was involved in Bangladesh Nationalist Party politics in 1979.<sup>67</sup> He had also pleaded embarrassment and refused to preside over Sheikh Mujib's murder case, giving rise to accusations of partisan attitude.<sup>68</sup> The 14<sup>th</sup> Amendment was strongly opposed by opposition groups and civil society on the grounds that raising the retirement age of Supreme Court judges would make both the judiciary and the caretaker government controversial. It could also lead to accusations that judicial appointments were being made in order to ensure that the head of the Caretaker Government would be sympathetic to the appointing party.<sup>69</sup> The controversial amendment was passed without bi-partisan support or extensive public consultation.<sup>70</sup> The Awami League, which was in opposition, did not attend parliament or vote on the amendment, having 'boycotted' parliament (parliamentary walk-outs and the refusal to attend parliamentary sittings in Bangladesh are known as 'boycotts'). The Bill was passed 226-1 in a partial vote, with only Kader Siddiqui of the Krishik Shramik Janata League voting against the

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<sup>66</sup> Chapter IIA, Non-Party Caretaker Government, Constitution of the People's Republic of Bangladesh. (Chapter IIA was repealed in 2011).

<sup>67</sup> 'KM Hasan was involved in BNP politics in 1979', *The Daily Star*, 21 September 2006.

<sup>68</sup> 'KM Hasan was involved in BNP politics in 1979', *The Daily Star*, 21 September 2006.

<sup>69</sup> 'A Controversial Amendment' (2004) *21 Frontline*, World Affairs, 5-18 June 2004.

<sup>70</sup> 17 March 2004, the Constitution (14<sup>th</sup> Amendment) Bill, 2004. Minutes of Proceedings. On file with Auhtor.



Bill. All members of the Bangladesh Nationalist Party Grand Alliance that were present in Parliament voted for the Bill.<sup>71</sup>

Matters got worse when on 4 January 2006, the High Court gave a judgment directing the Bangladesh Election Commission to update the voter list based on the existing one instead of creating a new voter list, in two separate writ petitions,<sup>72</sup> filed by opposition Awami League Members of Parliament, Mohammed Abdul Jalil and Advocate Rahmat Ali. The Election Commission Secretariat, on 6 December 2005, had announced a timetable for preparing a fresh voters' list, with the enumeration to start on 1 January 2006 and publication of the final list on 1 June 2006.<sup>73</sup> Two of the three Election Commissioners, Munsef Ali and Mohammad Ali, however, alleged that they had not approved the preparation of a 'fresh' voters' list.<sup>74</sup> The opposition parties also alleged that the enumerators hired by the Election Commission were mostly partisan and that the list contained millions of false voters (a specific case study of 900 names that were illegally added to the voter list is discussed in detail in Chapter four).<sup>75</sup> NGOs in Bangladesh fielded surveys and validated the opposition parties' claim that the voter list was inflated. The field surveys found that some of the enumerators were openly partisan, that local political elites often interfered in the enumeration process and that some enumerators were not visiting areas with majority religious or ethnic minorities.<sup>76</sup> The Bangladesh

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<sup>71</sup> 17 March 2004, the Constitution (14<sup>th</sup> Amendment) Bill, 2004. Minutes of Proceedings. On file with Auhtor.

<sup>72</sup> *MA Jalil v Bangladesh* ; and *Advocate Rahmat Ali and another v Bangladesh* , respectively, Writ Petitions Nos. 9180 of 2005 and 9157 of 2005.

<sup>73</sup> Sara Hossain and Adeeba Aziz Khan 'Judicial Developments on Fundamental Rights', *Human Rights in Bangladesh 2006*, (Dhaka: Ain O Shalish Kendro, 2007) 27-28.

<sup>74</sup> Hossain and Khan, *Judicial Developments on Fundamental Rights*, 27-28.

<sup>75</sup> 'Messy Bangladesh: Political Chaos Ahead of this Month's General Election', *The Economist*, January 5, 2007.

<sup>76</sup> Shamsul Huda, 'Challenges in Management of Electoral Rolls':

<[http://eci.nic.in/eci\\_main/dj/Bangladesh.pdf](http://eci.nic.in/eci_main/dj/Bangladesh.pdf), prepared for aceproject.org>(Accessed on 1 September 2015).

chapter of the National Democratic Institute (NDI)<sup>77</sup> and the NGO Brotee found that there were approximately 12 million extra names on the list. Brotee undertook a door-to-door enumeration of voters in 28 constituencies and found that the electoral roll prepared by the Election Commission contained 17.3% excess voters.<sup>78</sup> A senior employee of NDI confirmed these findings during an interview with the researcher.<sup>79</sup>

Despite accusations that Bangladesh Nationalist Party and its allies had installed its supporters into the Caretaker Government and the Election Commission, and claims that the voter list was grossly inflated,<sup>80</sup> Parliament was dissolved in October 2006 after the government's five-year term, as stipulated in the Constitution, and a Caretaker Government was appointed in order to hold elections. However, because Justice Hasan, the last retired Chief Justice had refused the position following the accusations against him after the 14<sup>th</sup> amendment was passed, the then President, Iajuddin Ahmed, appointed himself as the Chief Advisor, without exhausting all the options as laid out in the Constitution. These options included other judges of the High Court and appointment of a citizen after consultation with major political parties.<sup>81</sup> Devin Hagerty notes that 'The Caretaker Government and Election Commission were demonstrably tilted towards the Bangladesh Nationalist Party, and election specialists noted that Bangladesh had a voting-age population of roughly 80 million people but a voter list totaling 93 million'.<sup>82</sup> The Awami League boycotted the elections and announced that it would strive to prevent them from taking place. The prevention strategy consisted of

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<sup>77</sup> The National Democratic Institute an NGO funded by the US democratic party with a mandate to support and strengthen democracy worldwide <<https://www.ndi.org/>> (Accessed on 1 September 2015).

<sup>78</sup> <[www.brotee.org](http://www.brotee.org)> (Accessed on 13 September 2015).

<sup>79</sup> Interview A3.

<sup>80</sup> Supriya Singh, 'Bangladesh in 2006: Teetering political edifice and democracy', *Institute of Peace and Conflict Studies Special Report 35* (March 2007).

<sup>81</sup> Chapter IIA, Non-Party Caretaker Government, Constitution of the People's Republic of Bangladesh. (Chapter IIA was repealed in 2011).

<sup>82</sup> Devin Hagerty, 'Bangladesh in 2007: Democracy Interrupted, Political and Environmental Challenges Ahead' *Asian Survey* 48 (2008): 177-178.

wide-scale street agitation, violence, and the declaration of *hartals*.<sup>83</sup>

In the run up to elections, between October and December 2006, election related violence between supporters of different political parties and alliances led to 28 deaths and many injuries.<sup>84</sup> Following months of political wrangling, and the opposition's prevention strategy of non-stop *hartals* and violence, President Iajuddin Ahmed resigned from the post of Chief Advisor of the Caretaker Government on 11 January 2007.<sup>85</sup> On the same day he declared a state of emergency. The elections, which were to be held on 22 January 2007 were postponed indefinitely, and the sitting Caretaker Government (which the Awami League accused of being partisan) was replaced by a new Caretaker Government. The constitutionality of the new Caretaker Government was always dubious and there is nothing in the emergency provisions of the Constitution regarding the Caretaker Government.<sup>86</sup> The Constitution assumes that emergency would be declared during the term of an elected Parliament. Because the first Caretaker Government, headed by President Iajuddin, was dissolved before it served 90 days (the Constitution requires the Election Commission to hold elections within 90 days of the Parliament being dissolved), the appointment of the second Caretaker Government did not violate any provisions of the Constitution. However, the issue remained whether the Caretaker Government was valid after 90 days and under emergency rule. The 22 January 2007 Caretaker Government stayed in power for almost two years with emergency in place for the entire period. Proponents of the Caretaker Government argued that the 90 day time limit did not apply to it because Article 58C(12) stipulated that 'The Non-Party Caretaker Government shall stand dissolved on the date on which the Prime Minister

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<sup>83</sup> *Hartals* are opposition imposed shutdowns of workplaces, shops, schools etc. Those who defy *hartals* may be attacked by supporters of the political party calling the *hartal*.

<sup>84</sup> World Report 2007, Bangladesh: Events of 2006, Human Rights Watch, <<http://www.hrw.org/world-report-2007/bangladesh>> (Accessed on 9 September 2015).

<sup>85</sup> Abu Tayeb Rafiqur Rahman 'Bangladesh Election 2008 and Beyond', (Dhaka: University Press Limited, Dhaka) 1.

<sup>86</sup> Rahman, 'Bangladesh Election 2008 and Beyond', 2.

enters upon his office after the constitution of the New Parliament'. This implied that a Caretaker Government can function until the new Parliament comes to being and that the 90 day limit only applied to the Election Commission because of Article 123(3) which states, 'A general election of Members of Parliament shall be held within ninety days after Parliament is dissolved'.<sup>87</sup>

The Caretaker Government of 2007-2008 had the backing of the army and the international donor community. The international donor community plays a very important role in Bangladesh and hold a large amount of influence because of the high level of aid dependency.<sup>88</sup> However, concerns existed about the role of the army in the formation of the Caretaker Government and the extent of its control over the transitional government during its two-year tenure.<sup>89</sup> The two-year state of emergency, and the delay in holding elections, led to anxiety about whether Bangladesh would return to democratic rule.<sup>90</sup> However, despite concerns about its legitimacy, during 2007 and 2008 when the Caretaker Government was in power, substantive reforms were made to the electoral legal framework for the first time in the history of Bangladesh, and these are generally accepted to have strengthened the electoral framework, at least on paper.<sup>91</sup> Major reforms were introduced in campaign finance laws, boundaries were redrawn, a new voter list was prepared and voter IDs were given to all voters (these reforms are discussed in detail in Chapter seven). Concerns about the intentions of the army and the Caretaker Government were acquiesced and the Caretaker Government held the election on 29 December 2008, when the Awami League won an overwhelming mandate. Soon

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<sup>87</sup> Rahman, 'Bangladesh Election 2008 and Beyond', 2.

<sup>88</sup> For an understanding of the role of the international donor community and aid conditionalities in Bangladesh, see, Mosharraf Hossain, 'Aid Conditionalities and Development Imperatives of Bangladesh', in *Aid and Political Conditionality*, ed. Olav Stoke (London: Routledge, 1995)

<sup>89</sup> Hagerty, 'Bangladesh in 2007', 177.

<sup>90</sup> See generally, Nick Robinson and Nawreen Sattar, 'When Corruption is an Emergency: Good Governance Coups and Bangladesh', *Fordham International Law Journal*, 35 (2012): 737-779.

<sup>91</sup> See, UNDP, 'Transforming Challenges into Success: UN Study on Bangladesh Election', 10 May 2010.

after elections and the swearing in of the new Parliament, many of the electoral reforms introduced by the Caretaker Government were diluted or not implemented, showing that legal change may have little effect when it comes into conflict with informal processes.

The second major breakdown in the electoral process in Bangladesh since 1996 took place prior to the 5 January 2014 elections. Following the constitutionally dubious tenure of the 2007 Caretaker Government, the Awami League government, which came to power in 2008 passed the Constitution (15<sup>th</sup> Amendment) Bill, which removed the provision of the Non-Party Caretaker Government from the Constitution in 2011. The 9<sup>th</sup> Parliament, led by the Awami League, passed the 15<sup>th</sup> amendment to the Constitution in June 2011 amidst a ‘boycott’ of Parliament by the Bangladesh Nationalist Party opposition alliance with a 291-1 majority. The only dissenting vote came from the sole independent Member of Parliament,<sup>92</sup> while all others present during the voting were members of the ruling alliance. As a result of the 15th amendment and the consequent repeal of the Caretaker Government provision from the Constitution, the Bangladesh Nationalist Party boycotted the 10<sup>th</sup> Parliamentary election held on 5 January 2014. The national election of 5 January 2014 was held amidst unprecedented violence and 153 seats were won uncontested.<sup>93</sup> 153 out of 300 seats had no polling on election day, but as per Article 19 of the Representation of the People’s Order 1972,<sup>94</sup> the Election Commission was allowed to declare a candidate the winner of a seat if there are no others contesting a seat. Consequently, these seats were given to the government or its allies. Thus, Bangladesh currently has a Parliament with 153 uncontested representatives out of the 300 elected seats.<sup>95</sup> All Members of Parliament are candidates of the Awami

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<sup>92</sup> From the Proceedings of the Constitution (15<sup>th</sup> Amendment) Bill. On file with the author.

<sup>93</sup> Inter-Parliamentary Union Reports, Bangladesh Jatiyo Sangshad, <[http://www.ipu.org/parline-e/reports/2023\\_E.htm](http://www.ipu.org/parline-e/reports/2023_E.htm)> (Accessed on 1 September 2015).

<sup>94</sup> The Representation of the People’s Order 1972 was never renamed as an Act, even though Parliament has made amendments to the Order.

<sup>95</sup> Besides the 300 elected seats there are 50 reserved seats for women.

League or one of its allied parties. This puts the legitimacy of the government in question, and has led many to assert that democracy in Bangladesh is currently breaking down,<sup>96</sup> and the opposition has claimed that the country is moving towards one party rule.<sup>97</sup>

Electoral violence in Bangladesh has been on the rise. In 2006 Human Rights Watch reported 28 election related deaths.<sup>98</sup> In 2014, no such number could be determined but the same organization reported that 'Parliamentary elections in Bangladesh in January 2014 were the most violent in the country's history'.<sup>99</sup> Electoral violence is perpetrated by successive opposition groups in Bangladesh prior to elections because of a lack of trust in formal electoral institutions. This dissertation sheds light on the weaknesses in formal constitutional institutions involved in elections, such as the Election Commission, Parliament and the Judiciary. To understand the puzzle of weak electoral institutions and failing democratic consolidation in Bangladesh, it is necessary to understand the 'actual existing' social and power relations and this dissertation attempts to do so by highlighting the informal processes within the formal electoral regime. In the words of Michael Bratton, 'Real world politics (is) driven by more contextual dynamics, in which "actual existing" social and power relations - not words on paper - determine who gets what, when and how'.<sup>100</sup> To understand democratization in emerging democracies where the rule of law is weakly developed or ignored, it is important to study the role of informal institutions.<sup>101</sup> The following chapter discusses the global debate on democracy and

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<sup>96</sup> Badiul Alam Majumder, 'Democracy Down the Slippery Slope', *The Daily Star*, 16 July 2014.

<sup>97</sup> 'Government Planning to Impose One Party Rule: Fakhrul', *New Age*, 18 August 2014.

<sup>98</sup> World Report 2007, Bangladesh: Events of 2006, Human Rights Watch: <<http://www.hrw.org/world-report-2007/bangladesh>> (Accessed 1 September 2015).

<sup>99</sup> 'Democracy in the Crossfire: Opposition Violence and Government Abuses in the 2014 Pre and Post Election Period in Bangladesh', Human Rights Watch, 2014.

<sup>100</sup> Michael Bratton, 'Formal Versus Informal Institutions in Africa', *Journal of Democracy*, 18 (2007) 96.

<sup>101</sup> Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox', *The State and Constitutionalism: An African Debate on Democracy*, ed. Issa Shivji, Harare,

formal and informal institutions and gives a literature review of democratization in Bangladesh, thereby setting out the theoretical underpinnings of this dissertation.

### **1.3. Structure of the Study**

In this introductory chapter, the statement of the problem and the aims of the study have been delineated and a historical overview of politics and elections in Bangladesh has been provided. Particular emphasis has been given to the history of constitutional and legal manipulation by the executive in order to remain in power and in order to gain control over constitutionally separated bodies of the state. Chapter two will highlight international debates on democracy and formal and informal institutions on which this dissertation is grounded. It will review the literature on democracy and informal institutions in Bangladesh, outlining the insights and conceptual tools that can be derived from extant scholarly work, while also highlighting some of the gaps and shortcomings that characterize them. Chapter three will then go on to explain the methodological framework employed by this study.

Chapter four gives an overview of the formal institutional weaknesses of the Election Commission. It also highlights the manifestation of informal institutions within the Election Commission through the use of case studies based on the Voter List of 2006. The in-depth analysis of the details and backgrounds of two writ petitions filed with the High Court in relation to the 2006 Voter List allows the chapter to illustrate the specific workings and effects of informal institutions within the Election Commission. The use of interviews and primary sources, including letters exchanged between Election Commission officials, allows this chapter to provide a rare glimpse into the specific

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SAPES Trust, 1991. See also, Goran Hyden, 'African Politics in Comparative Perspective', Cambridge University Press, 2006.

analysis and actual workings of nepotism, corruption, partisanship and electoral malpractice in Bangladesh.

Chapter five is a study of constitutional amendments with regards to the Caretaker Government. The chapter studies the context in which the 15th amendment to the Constitution, which abolished the Non-Party Caretaker Government, was passed and the way in which a Supreme Court decision was utilised in order to lend legitimacy to the amendment. In chapter five the researcher argues that recent constitutional amendments in Bangladesh have been used in a partisan manner for political expediency and electoral advantage of the incumbent. The chapter uses the Special Committee Report on the 15<sup>th</sup> amendment and the 13th amendment judgment by the Supreme Court<sup>102</sup>, to illustrate how institutions of accountability, particularly the judiciary, is being utilised by the government and how these institutions are increasingly partisan in their actions.

Chapter six is a study of patronage and partisan appointments within the Judiciary and how these impact judicial development of electoral reform. By analyzing the infiltration of patronage and partisanship in the appointment of judges, this chapter shows how the attempt to export 'good governance' electoral reform has been resisted by formal institutions mired in patronage in Bangladesh. The politicization of the Judiciary has effected when judicial development of electoral reform has been forthcoming and these have been statist and dependent on the desires of the government of the day. Chapter six illustrates the above by using the landmark decision on mandatory disclosure of candidates' information.

Chapter seven uses formal reforms introduced by the 2007 Caretaker Government to political parties candidate nomination process to highlight the futility of formal institutional reform in the face of conflict with informal institutions. The candidate

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<sup>102</sup> Re: Constitution of Bangladesh (13th Amendment Act Case) ADC Vol. IX (A) (2012).



selection crisis faced by the Awami League prior to the Narayanganj City Corporation Poll of 2011 is used as a case study to highlight how informal institutions such as patronage and dynastic politics are viewed as more binding than formal legal reform by Bangladeshi political parties.

Finally, the thesis concludes with a summary of the arguments presented. After briefly revisiting the theoretical and methodological underpinnings of the thesis, an overview is provided of the formal and informal mechanisms through which successive executives have maintained control over the electoral legal regime, and reinforced the opposition mistrust of electoral institutions and the resultant democratic breakdowns. The thesis ends with a few tentative thoughts on the relationship between law, informal institutions and violence and what these phenomenon mean for the future of democratization in Bangladesh.

## Chapter 2 – Theory and Literature Review

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### 2.1. Theories of Democracy

Theories of democracy are varied and manifold. Theorists have not come to a consensus on what democracy means because there are numerous and vastly different democracies in the world. Third wave democracies<sup>1</sup> have faced such differing challenges that the problems of identifying democracy and how to reach democratic consolidation have ‘expanded beyond all recognition.’<sup>2</sup> Scholars studying democracy are divided between those who argue in favor of *degrees* of democracy and those who talk about *types* of democracy. Degrees of democracy usually measure levels of democracy using an index or scale. On the other hand, those who speak of ‘types’ of democracy have named hundreds of (Collier and Levitsky identify 550<sup>3</sup>) types of nominal and diminished subtypes of democracy. A discussion of the different types of democracy as identified by scholars of democratization, will highlight that Bangladesh has not reached the stage of what is known as a ‘Liberal’ democracy but rather still face challenges that make it a more diminished type of democracy and has features that coincide with what scholars have termed ‘mid-range’ and ‘pseudo’ democracies’. In the views presented here, the researcher contends that informal institutions are dominant in Bangladesh and have a strong influence on formal institutions. This affects democracy in the country by getting in the way of key features of liberal democracies such as, a functioning opposition, multi-party electoral participation, civil liberties and checks and balances through separation of power, as described in detail below. The observable outcome of informal institutions, as far as this research is concerned, is the increasing enactment of exclusionary electoral

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<sup>1</sup> Third wave democracies is a term coined by Samuel Huntington and refers to the third surge of democratization in history, that lasted through the 1970s, 80s and 90s with democratic transition in Latin America, Asia Pacific countries and Eastern Europe.

<sup>2</sup> Andreas Schedler, ‘What is Democratic Consolidation?’ *Journal of Democracy*, 9 (1998) 91.

<sup>3</sup> See Davis Collier and Steven Levitsky, ‘Democracy with Adjectives: Conceptual Innovation in Comparative Research’, *World Politics* 49 (1997) 430-451.

rules that make elections less accessible to opposition parties and the partisan implementation of electoral rules by public servants.

### ***2.1.1. Democratic Theory***

Diamond suggests four broad types of democracy, namely electoral democracy, liberal democracy, mid-range democracy and pseudo-democracy:<sup>4</sup>

#### *Electoral' Democracy*

Schumpeter defined democracy as a system 'for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.<sup>5</sup> More recently, scholars including Huntington, Lipset, Linz and Przeworski amongst others have endorsed this definition of democracy, and have clarified and refined Schumpeter's work. Huntington notes that the extent of rights, rules and 'stability of a system differs from the nature of a system'<sup>6</sup>, and as long as the nature of the system is electoral, the system is democratic. However, Schmitter and Karl point to the flaw in this definition of democracy simply as regime classification, because multiparty elections do not necessarily mean free, fair and participatory elections.<sup>7</sup> Bangladesh is a perfect example of this, because despite the holding of elections every five years, the democratic nature of these elections, particularly under authoritarian regimes of the past and more recently in 1996 and 2014, is highly questionable as will be seen throughout this dissertation.

#### *Liberal' Democracy*

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<sup>4</sup> See generally, Larry Diamond, *Consolidating the Third Wave Democracies: Themes and Perspective*, (Baltimore: Johns Hopkins University Press, 1997).

<sup>5</sup> Joseph Schumpeter, *Capitalism, Socialism and Democracy*, (New York: Harper, 1947) 269.

<sup>6</sup> Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, (Norman: University of Oklahoma Press 1991) 3.

<sup>7</sup> Phillippe Schmitter and Terry Lynn Karl 'What democracy is... and is not', *Journal of Democracy*, 2 (1991): 104.

With the observation of democratic development in the third wave democracies, theorists seem to be rejecting the notion that the extent of rights, rules and ‘stability of a system differs from the nature of a system’<sup>8</sup> and have set higher standards for the definition of democracy that go much beyond holding elections. For these theorists, the reality of the process of democratization is a lot more complicated than the simple regime classification of the mid-twentieth century as defined by Schumpeter.<sup>9</sup> Modern theorists have observed that despite becoming electoral democracies, many of the third wave countries seem to be struggling with the transition to become a liberal democracy.<sup>10</sup> Thus, scholars have noted that the definition of democracy can no longer be seen ‘just in the terms of public balloting, but much more capaciously, in terms of what John Rawls calls ‘the exercise of public reason’.<sup>11</sup> In fact, electoral democracy is said to be a ‘minimalist’ standard<sup>12</sup> and other ‘thicker’ concepts of democracy are defined as liberal democracy, embedded democracy, constitutionalism, government by discussion and institutional democracy amongst many others.

Dahl has suggested his ‘procedural theory’ or ‘polyarchy’, which includes a number of conditions before a state can be defined as democratic.<sup>13</sup> Firstly, elected officials must have constitutional authority to run government; Second, state officials must be chosen through periodic, free and fair elections; Third, all citizens must have the right to run for office and the right to vote; and finally, freedom to access information, freedom of expression, freedom of publication of information, freedom of assembly and freedom of

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<sup>8</sup> Huntington, ‘The Third Wave: Democratization’, 3.

<sup>9</sup> Schumpeter, ‘Capitalism, Socialism and Democracy’, 269.

<sup>10</sup> See generally, Diamond, ‘Consolidating the Third Wave Democracies’.

<sup>11</sup> Amartya Sen, *The Idea of Justice*, (London: Allen Lane, 2009) 324.

<sup>12</sup> Larry Diamond, Thinking About Hybrid Regimes, *Journal of Democracy*, 13 (2002) 22.

<sup>13</sup> Robert A. Dahl, *Polyarchy: Participation and Opposition*, 1971, Yale University Press.

association must be protected.<sup>14</sup> In Diamond's words, the three aspects of Dahl's 'polyarchy' are opposition, participation and civil liberties.<sup>15</sup> Diamond takes it a little further and also finds other key components of democracy, which include checks and balances through separation of powers, protection of minority rights, and the freedom of thought and belief. Furthermore, according to Diamond, these rights, freedoms and pluralism can only exist when there is 'rule of law'.<sup>16</sup>

Schmitter and Karl define democracy as a system in which, rulers can be held accountable by citizens.<sup>17</sup> While elections ensure this to some extent, according to the authors, a constitution and its subsequent laws are necessary in order to create 'an ensemble of patterns that determines the methods of access to the principal public offices; the characteristics of the actors admitted or excluded from such access; the strategies that actors may use to gain access; and the rules that are followed in the making of publicly binding decisions.'<sup>18</sup> Further, for Schmitter and Karl, elected officials should be able to freely exercise the powers vested in them and there should be no outside interference to influence state power, thereby preserving the autonomy and sovereignty of nation-states.<sup>19</sup> According to Merkel liberal or embedded democracy consists of five partial regimes, all of which need to be satisfied. These regimes can be divided into democratic electoral regime, political rights of participation, civil rights, horizontal accountability and effective power for elected representatives.<sup>20</sup>

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<sup>14</sup> Dahl, 'Polyarchy: Participation and Opposition'.

<sup>15</sup> Larry Diamond, *Developing Democracy: Toward Consolidation*, Baltimore: Johns Hopkins University Press, 1999) 8.

<sup>16</sup> Diamond, 'Developing Democracy', 8.

<sup>17</sup> Schmitter and Karl, 'What democracy is... and is not', 103.

<sup>18</sup> Schmitter and Karl, 'What democracy is... and is not', 103.

<sup>19</sup> Schmitter and Karl, 'What democracy is... and is not', 105.

<sup>20</sup> Wolfgang Merkel, 'Embedded and Defective Democracies', *Democratization*, 11 (2004) 33-58.

For proponents of liberal democracy the demand for liberal rights takes priority and even ‘demotes the democratic process to an inferior status’.<sup>21</sup> Fareed Zakaria notes that democratically elected regimes around the world are routinely ignoring constitutional limits on their power and thereby depriving citizens of their basic rights and freedoms.<sup>22</sup> Zakaria writes that in today’s world ‘democracy is flourishing, constitutional liberalism is not’ and that half the democratizing countries in the world today are illiberal democracies<sup>23</sup> and therefore need to be differentiated from liberal democracies. Diamond finds astonishing the ‘frequency with which contemporary authoritarian regimes manifest, at least superficially, a number of democratic features’.<sup>24</sup>

### Midrange Democracies

Midrange democracies are those nations which fall somewhere between electoral democracy and liberal democracy. Linz defines midrange democracies as a political system, which guarantees basic political freedoms and regular, free and fair elections for all public offices.<sup>25</sup> However, mid-range democracies have flawed rule of law because legal rules are applied unfairly and inconsistently. Mid-range democracies may be polyarchies, which exist within the framework of clientelism and there is little respect for formal rules.

### Pseudo-democracy

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<sup>21</sup> Jurgen Habermas, ‘Reconciliation through the Public use of Reason’: Remarks on John Rawls’s Political Liberalism’, *Journal of Philosophy*, 92 (1995) 127.

<sup>22</sup> Fareed Zakaria, ‘The Rise of Illiberal Democracy’, *Foreign Affairs*, 76 (1997) 24.

<sup>23</sup> Zakaria, ‘The Rise of Illiberal Democracy’, 24.

<sup>24</sup> Diamond, ‘Thinking About Hybrid Regimes’, 23.

<sup>25</sup> Juan Linz, *The breakdown of Democratic Regimes: Crisis, Breakdown and Reequilibration* (Baltimore: Johns Hopkins University Press, 1978).

Diamond, Linz and Lipset include a fourth type category of democratic regime, which they term 'pseudo democracy'.<sup>26</sup> These are authoritarian regimes with some democratic features such as multiparty elections. In these regimes, the ruling party engages in actions to ensure that legal opposition parties do not have a chance to compete for power.<sup>27</sup> In this system the ruling party wins elections with massive margins and maintains itself in power. Pseudo democracies have higher levels of tolerance for legal opposition parties and gives more space for dissent activity in civil society than authoritarian regimes or non-democracies.

The above illustration of the manifold democratic theories and international debates on the wide range of types of democracies, brings the thesis to the question of what type of democracy is Bangladesh and what is the author comparing it to? Joseph Devine suggests that 'even if we accept that democracy can take multiple forms, it is expected to at least possess core institutional arrangements (free and fair elections, stable legislatures and so on) and to promote basic principles (political freedom to exercise voice, accountability of elected officials and so on) that limit the need to turn to violence.'<sup>28</sup> This author agrees that as a minimum, democracies should be promoting principles that limit the need to turn to violence. Further, as defined by Schedler, democratic consolidation means the prevention of democratic breakdown and its erosion<sup>29</sup>, in a country where (more or less) free, fair and competitive elections are held. Democratic breakdown happens when democratic regimes are threatened by overthrow. Democratic erosion is known as 'the threat of silent regressions from democracy to semi-democratic rule' through paths such as the decay of electoral institutions, weak rule of law, weak separation of powers, the

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<sup>26</sup> Larry Diamond, Juan Linz and Seymour Lipset, *Politics in Developing Countries* (Boulder: Lynne Rienner Publishers, 1995).

<sup>27</sup> Diamond, 'Thinking About Hybrid Regimes', 25-27.

<sup>28</sup> Joseph Devine, 'Governance, Democracy and the Politics of Well-Being', WeD Working Paper 36, *ESRC Research Group of Well-Being in Developing Countries*, 2007, 3.

<sup>29</sup> Andreas Schedler, 'What is Democratic Consolidation?', *Journal of Democracy*, 9(1998) 91.

rise of hegemonic parties and so on.<sup>30</sup> The different routes that democratic erosion or breakdown may take have been attributed to various reasons from economic trends to reassertion of military supremacy, lack of civil society to the type(s) of preceding authoritarian regimes.<sup>31</sup> In this dissertation the researcher contends that Bangladesh is facing democratic erosion because of weaknesses in formal institutions, which are further aggravated by the primacy of informal institutions over formal institutions that lead to the personalization and non-separation of formal institutions for partisan gain. This, in turn, leads to political violence, and therefore shows a failure in Bangladesh of what Devine terms core democratic institutional arrangements and principles.<sup>32</sup>

## **2.2. Formal Institutions and the Doctrine of Separation of Powers in Liberal Democracies**

It is an accepted ideal in liberal democracies (as defined above in Section 2.1.1.) that the exercise of governmental power should be limited, so that it does not itself destroy the values it intended to promote and protect.<sup>33</sup> The most prominent theory to address the dilemma of limiting governmental power in a democratic state is the doctrine of separation of powers. In its essence, the doctrine of separation of powers means that the traditional branches of government, constituting of the legislature, the executive and the judiciary, should be independent of each other, must work only within the ambit of their mandated powers and must not encroach upon each other's area of functions.<sup>34</sup> It is thought that Aristotle first identified the three branches of state power – deliberative (legislative), magisterial (executive) and judicial.<sup>35</sup> The identification was followed by

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<sup>30</sup> Schedler, 'What is Democratic Consolidation?', 91.

<sup>31</sup> Schedler, 'What is Democratic Consolidation?', 91.

<sup>32</sup> Devine, 'Governance, Democracy and the Politics of Well-Being', 3.

<sup>33</sup> M.J.C Vile, '*Constitutionalism and the Separation of Powers*', (Indianapolis: Liberty Fund, 1998) 22.

<sup>34</sup> For a fuller account of the doctrine, see, Vile, 'Constitutionalism and the Separation of Powers', and Bruce Ackerman, 'The New Separation of Powers', *Harvard Law Review*, 113(2000), 633-725

<sup>35</sup> Vile, 'Constitutionalism and the Separation of Powers', 24.



emphasis on institutional and personal separation of these branches by John Locke in the late 17<sup>th</sup> century (although he only wrote about separating legislative and executive powers).<sup>36</sup> During the 18<sup>th</sup> century, Montesquieu, who is known as the father of the modern separation doctrine, put forth the institutional separation of powers and considered judicial separation the most important of the separations because it ensures rule of law by securing citizens' liberty from encroachment by the executive and the legislative.<sup>37</sup>

While in recent years, there is recognition that the doctrine cannot be viewed with the same rigidity as traditional theorists promoted,<sup>38</sup> and Barber writes that 'modern (formal) institutions increasingly possess powers drawn from two or more of the classic separation of trinity',<sup>39</sup> for example because of powers of judicial review (which allows the judiciary to limit the legislative in order to protect the constitution and ensure constitutionality of legislation). However, the problem of the control of government remains. The separation of powers to the extent that state arbitrariness may be controlled is increasingly gaining recognition as a minimum standard of constitutionalism.<sup>40</sup> The theory of checks and balances has emerged in order to address the problem of limiting government in the modern society. The theory of checks and balances emphasizes on means and ways that can control and hold accountable the other branches of government (or for the sake of this thesis, formal institutions created by the Constitution).<sup>41</sup>

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<sup>36</sup> Theodore Plucknett, 'A Concise History of the Common Law', (Indianapolis: Liberty Fund, 2010).

<sup>37</sup> Vile, 'Constitutionalism and the Separation of Powers', 83.

<sup>38</sup> Ackerman, 'The New Separation of Powers'.

<sup>39</sup> Nicholas Barber, 'Prelude to the Separation of Powers', *Cambridge Law Journal*, 60 (2001) 69.

<sup>40</sup> Trevor Allan, 'Constitutional Justice: A Liberal Theory of the Rule of Law', (Oxford: Oxford University Press, 2003) 33.

<sup>41</sup> For a detailed discussion on checks and balances and institutional accountability, please see, Adam Przewoski, Susan Stokes and Bernard Manin, 'Democracy, Accountability and Representation', (Cambridge: Cambridge University Press, 1999).

In a democratic state, formal institutions are intended to be separated and provide checks and balances so that no branch of government becomes too powerful, and so that rule of law and liberty are protected. In this dissertation, the researcher studies how informal institutions diminish the ability of formal institutions to provide checks and balances and hold other formal institutions accountable. This in turn gives excessive power to the executive, diminishing democracy and constitutionalism in Bangladesh.

### **2.3. Theories of Informal Institutions**

In theory, in a democracy elected officials hold political power through a system of legal procedures, transparency and accountability; i.e. if the public are not satisfied with the government, the leaders are held accountable and potentially fail to gather/maintain enough support to win the next elections. In democracies, formal institutions provide a methodology for public interest to take precedence over private interests and provide ‘multiple, ongoing channels of expression and representation of (citizens’) interests and values’<sup>42</sup> even in between elections. However, Guillermo O’Donnell writes, ‘the problem with many new polyarchies is not that they lack institutionalization. Rather.. these polyarchies have two extremely important institutions. One is highly formalized but intermittent: elections. The other is informal, permanent and pervasive: particularism (or clientelism broadly defined)’.<sup>43</sup> Therefore, the reality of democratization is not as simple as in theory - besides formal democratic institutions, all societies have underlying informal institutions that contribute to the functioning of democracy. Traditionally, political scientists have paid more attention to formal institutions and rules. As Helmke and Levitsky write:

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<sup>42</sup> Diamond, ‘Developing Democracy: Toward Consolidation’, 11.

<sup>43</sup> Guillermo O’Donnell, ‘Illusions about Consolidation’, *Journal of Democracy*, 7 (1996) 35.

much current literature assumes that actors' incentives and expectations are shaped primarily, if not exclusively, by formal rules. Such a narrow focus can be problematic, because it risks missing much of what drives political behavior and can hinder efforts to explain important political phenomenon.<sup>44</sup>

Amongst the reasons attributed to the difficulty of political transition to democracy in third wave countries are these underlying informal structures.<sup>45</sup> In O'Donnells words, 'in contrast to previous periods of authoritarian rule, particularism (clientelism) now exists in uneasy tension with the formal rules and institutions'.<sup>46</sup> The following is a discussion on informal institutions and their impact on formal separation of powers. The chapter then moves on to a literature review on democracy, separation of powers and the particular types of informal institutions found in Bangladesh.

### ***2.3.1. Informal Institutions and types of impact***

Traditionally institutions have been understood as the 'controlling, organized organs of state'<sup>47</sup> embodied in constitutions, commercial codes, administrative regulations and laws, civil service procedures and judicial structures. Their features are readily observable through written documents, physical structures (e.g., ministry buildings, legislatures and courthouses), and public events (e.g., elections, parliamentary hearings, city council meetings and legal proceedings). However, neo-institutionalist understanding of institutions goes beyond the traditional analysis. Rather institutions are understood as 'norm patterns which shape behavior, and which can expect reciprocal behavior from

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<sup>44</sup> Helmke and Levitsky, 'Informal Institutions and Comparative Politics: A Research Agenda', 725.

<sup>45</sup> Derick Brinkerhoff and Arthur Goldsmith, 'Clientelism, Patrimonialism and Democratic Governance: An Overview and Framework for Assessment and Programming', U.S. Agency for International Development Office of Democracy and Governance, December 2002: 1.

<sup>46</sup> O'Donnell, 'Illusions about Consolidation', 35.

<sup>47</sup> Lauth, 'Informal Institutions and Democracy', 23.

fellow citizens'.<sup>48</sup> Douglas North defines institutions as 'game rules of a society or... the limitations of human action as conceived by people'.<sup>49</sup> Similarly Guillermo O'Donnell notes that 'By..institution I mean a regularized pattern of interaction that is known, practiced and accepted (if not necessarily approved) by actors who expect to continue interacting under the rules sanctioned and backed by that pattern'.<sup>50</sup> Informal institutions are based solely on the fact of their existence and their effectiveness. They are based on implicit and unwritten understandings. They reflect socio-cultural norms and routines, and underlying patterns of interactions among socioeconomic classes and ethnic groups.

The authority of these informal institutions is based on social acceptance, which lends them a basic measure of legitimacy. One of the main features of this acceptance is due to the way in which informal institutions function and continue to:

make interaction between individuals and groups easier, by creating known and accepted behavioural structures which cannot be changed by any individual. Even if an actor does not wish to accept them, he or she obeys them, in accordance with rational calculation; the costs involved in rejecting them can only be offset when real behavioural alternatives are available.<sup>51</sup>

Informal institutions take a long time to change or dissolve as the participating actors have internalized the processes and these are reproduced by shaping future behavior and expectations. Scholars studying informal institutions have found that political behavior often follows rules or patterns that are not found in the formal or written rules. Rather,

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<sup>48</sup> Lauth, 'Informal Institutions and Democracy', 23.

<sup>49</sup> Douglass North, *Institutions, Institutional Change and Economic Performance*, (Cambridge: University Press, 1990) 3.

<sup>50</sup> O'Donnell, 'Illusions and Consolidation', 34.

<sup>51</sup> Brinkerhoff and Goldsmith, *Clientelism, Patrimonialism and Democratic Governance*, 24.

unwritten and informal constraints, which most actors nonetheless accepted, often shape incentives and behavior in a systemic way.<sup>52</sup>

In contrast to formal institutions, which receive their legitimacy through the state, informal institutions are based on auto-licensing (that is, self-enactment and subsequent self-assertion). While changes to formal institutions can be made by those with the authority to do so, this is not the case with informal institutions as these develop indigenously and there is no center to direct and co-ordinate their actions. Because informal institutions do not have a center and are based on auto-licensing, only when tangible recognition of informal institutions ends, so does their existence.

According to Wolf, 'The formal framework of economic and political power exists alongside or intermingled with various other forms of informal structures that are interstitial, supplementary or parallel to the formal framework'.<sup>53</sup> Lauth distinguishes three types of relationships between formal and informal institutions – complementary, substitutive and conflicting. When informal institutions co-exist with and support formal institutions it is a complementary type of informal institution. When the informal institution is as effective as the formal institution and is functionally equivalent to the formal institution it is a substitutive type of informal institution. Finally, the third type of informal institution, which is the type that this thesis is concerned with, is the conflicting type of informal institution. These institutions interfere with the functioning logic of formal institutions.<sup>54</sup> These informal institutions are dependent on the existence of formal institutions, they perpetuate by exploiting formal institutions for their own purposes by partially occupying or penetrating them. Levitsky and Helmke argue that it is only necessary to take informal rules seriously and study them when they are the

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<sup>52</sup> Levitsky and Helmke, 'Informal Institutions and Comparative Politics: A Research Agenda', 5.

<sup>53</sup> Eric Wold, 'Kinship, Friendship and Patron-Client Relations in Complex Societies', in *Pathways of Power*, ed. Eric Wolf, (Oakland: University of California Press, 2001) 167.

<sup>54</sup> Lauth, 'Informal Institutions and Democracy', 25.

conflicting type, because if formal institutions produce similar outcomes despite the existence of informal institutions, then there is little need to move beyond a focus on the formal institutions and rules.<sup>55</sup> This thesis shows that informal rules shape formal institutional outcomes in Bangladesh in significant ways. As examples of informal institutions, Hyden, cites charisma, clientelism, pooling and collective self-defense.<sup>56</sup> Bratton identifies three types of informal institutions as particularly pervasive in African democracies, i.e. clientelism, corruption and “Big Man” presidentialism.<sup>57</sup> Levitsky and Helmke also point to a few specific areas that were traditionally analysed only from a formal institutional perspective, which it is now clear are affected by the informal.<sup>58</sup> These include Executive-Legislative relations (these relationships cannot always be explained strictly in terms of constitutional design and oftentimes the degree of executive dominance over other branches such as the legislative and the judiciary far exceed constitutional prescriptions because of informal institutions); Electoral Rules (Informal institutions can impact the effectiveness of electoral rules such as because of the relationship between clientelism and candidate selections); and Judicial Politics (informal institutions affect executive-court relations and can result in judicial behavior that depart significantly from the stipulated formal rules).<sup>59</sup> This thesis touches on all these areas and highlights how informal rules and processes affect these formal institutions and their outcomes.

Khan writes that the average developing country is organized on the basis of ‘personalized exchanges between rulers and their factions, bureaucratic rules are regularly broken, and private interests are deeply penetrated in the public sphere represented by

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<sup>55</sup> Levitsky and Helmke, ‘Informal Institutions and Comparative Politics: A Research Agenda’, 5.

<sup>56</sup> Goran Hyden, *‘African Politics in Comparative Perspective’* (Cambridge: Cambridge University Press, 2006) 94-116.

<sup>57</sup> Michael Bratton, ‘Formal Versus Informal Institutions in Africa’, *Journal of Democracy*, 18 (2007) 97.

<sup>58</sup> Levitsky and Helmke, ‘Informal Institutions and Comparative Politics: A Research Agenda’, 5.

<sup>59</sup> Levitsky and Helmke, ‘Informal Institutions and Comparative Politics: A Research Agenda’, 5.

the bureaucracy'.<sup>60</sup> Scholars studying informal institutions are divided in their perspective of the impact of informal institutions and the personalization of the public sphere. Some such as Lemarchand and Ayşe Güneş-Ayata view informal institutions as a valuable method of obtaining transactional gains, resource allocation and for providing local, regional and national mechanisms of delivery.<sup>61</sup> They also claim informal institutions integrate diverse cultural groups into a national political community. While others such as Roniger, Kpundeh, Lauth and Kaufman contend that informal institutions of different types 'adversely impede development... and participatory governance'<sup>62</sup> and constitute '(a) non-universalistic quid pro quo between individuals or groups of unequal standing'.<sup>63</sup> Thus, for critics of informal institutions, these institutions conflict with the functioning logic of formal institutions. In their view formal institutions should promote public interest rather than private interest and should provide ongoing channels for the expression of citizens' interests and values. Informal institutions get in the way of the *raison d'être* of formal institutions and promote private interest rather than public interest. Further, participants within informal institutions are of unequal standing and in the case of patron-client relations, clients are beholden to patrons and are forced to participate in such relationships even if they do not wish to.

Students of informal institutions have found that the nature of informal institutions are not uniform in all societies but that they reflect the changing structure of the state and the society in which they take place. According to Eisenstadt and Roniger new types of informal institutions or clientelism appear as systems change and that informal

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<sup>60</sup> Mushtaq Khan, 'Markets, States and Democracy: Patron-Client Networks and the case for Democracy in Developing Countries', 10.

<sup>61</sup> Ayşe Güneş-Ayata, '*Democracy, Clientelism and Civil Society*', (Boulder: Lynne Rienner, 1994) and Rene Lemarchand, 'Political Clientelism and Ethnicity in Tropical Africa: Competing Solidarities in Nation Building', *American Political Science Review*, 66(1972) 68-90.

<sup>62</sup> Sahr John Kpundeh, 'Corruption and Corruption Control', in Gyimah Baodi, '*Democratic Reform in Africa: The Quality of Progress*', (Boulder: Lynne Rienner, 2004) 121.

<sup>63</sup> Luis Roniger, 'Political Clientelism, Democracy and Market Economy', *Comparative Politics*, 36 (2004) 354.

institutions reflects their social setting.<sup>64</sup> Lande notes that the variation of substructure to which patron-client relationships are attached will create a resultant type of clientelism.<sup>65</sup> Brown similarly observed that change in the structure of the state is reflected through change in the structure of clientelistic power relations and informal institutions.<sup>66</sup> Schmidt remarks that shifts in clientage occur with changes in the larger society. Devine, when observing Bangladesh, notes that clients shift to different patrons depending on who is distributing benefits (the type of benefit may also change), even when the patron becomes third sector actors such as NGOs.<sup>67</sup> Peters takes the view that it is futile to attempt to identify a system as political clientelism because the characteristics change too much over time.<sup>68</sup> Scholars of Bangladeshi politics are in general agreement that informal institutions are prevalent in Bangladesh. Clientelism, patronage, corruption, partisanship, excessive power in the hands of the Prime Minister and politicization are particularly pervasive.

## **2.4. Literature Review: Democracy, Institutional Weakness, Informal Institutions and Political Violence in Bangladesh**

The literature on democratization in Bangladesh points to a few recurring features of Bangladeshi politics as the reasons behind the pathological state of democracy and the weak state of governance in the country. Starting with the political parties, reasons for Bangladesh's 'dysfunctional democracy' are partly attributed to the 'historical baggage'

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<sup>64</sup> Eisenstadt, and Louis Roniger, 'Patron-Client Relations as a Model of Structuring Social Exchange', *Comparative Studies in Society and History*, 22 (1980) 47.

<sup>65</sup> Carl Lande, 'Political Clientelism in Political Studies: Retrospect and Prospects', *International Political Science Review*, 4( 1983) 437.

<sup>66</sup> Kenneth Brown, 'Changing Forms of Patronage in a Moroccan City', in *Patrons and Clients in Mediterranean Societies*, ed. in Ernest Geller and John Waterbury , (London: Centre for Mediterranean Studies of the American Universities Field Staff, 1977), 310.

<sup>67</sup> Joseph, Devine, 'NGOs, Politics and Grassroots Mobilisation: Evidence from Bangladesh', *Journal of South Asian Development* 1 (2006) 90-91.

<sup>68</sup> From Sharon Kettering, 'The Historical Development of Political Clientelism', *The Journal of Interdisciplinary History*, 18 (1988) 419.



carried by the dynastic leaders of the two main political parties,<sup>69</sup> the Bangladesh Nationalist Party and the Awami League. Both parties question the very legitimacy of the other to participate in politics. The Awami League is headed by Sheikh Hasina, the daughter of Sheikh Mujib and the Bangladesh Nationalist Party is headed by Khaleda Zia, the wife of Ziaur Rahman. Being dynastic, the parties are characterized by a lack of internal democracy with a highly centralized and personalized internal governance structure vesting near absolute power in the party chairperson. This further compounds the problem as personal rivalries between the two leaders take precedence over real political differences.<sup>70</sup> BRAC's<sup>71</sup> 2006 report titled 'State of Governance in Bangladesh' terms this 'the rise of partyarchy', a system where the winning party enjoys the monopoly of power for the duration of their electoral term.<sup>72</sup> As the report notes, "The innermost circle has de facto command over the entire party, legislature, parliamentary committees, procurement policies, development allocations, bureaucracy and law and order enforcement agencies."<sup>73</sup> Scholars such as Sobhan, Kochanek, Blair and Jahan express similar concerns about the monopolization of political power by the incumbent.<sup>74</sup> The dynastic mode of politics and the extreme centralization of power in the hands of the executive is widely regarded to be the most fundamental flaw in Bangladesh's parliamentary democracy. This is because all the other issues of corruption, lack of

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<sup>69</sup> For an account of the history of the Awami League and the Bangladesh Nationalist Party and sources of personal antagonism between the two leaders, Sheikh Hasina and Khaleda Zia, see Stanley Kochanek, "*Patron-Client Politics and Business in Bangladesh*", (New Delhi: Sage Publication, 1993).

<sup>70</sup> Islam, Mohammed Mozahidul, "The Toxic Politics of Bangladesh: A Bipolar, Competitive, Neopatrimonial State?", *Asian Journal of Political Science*, 21 (2013) 148-168.

<sup>71</sup> BRAC (formerly known as Bangladesh Rural Advancement Committee, now simply as BRAC is the largest NGO in Bangladesh).

<sup>72</sup> BRAC, State of Governance in 2006, 20.

<sup>73</sup> BRAC, State of Governance in 2006, 20.

<sup>74</sup> Sobhan, 'Structural Dimensions of Malgovernance in Bangladesh'; Stanley Kochanek, 'Governance, Patronage Politics and Democratic Transition in Bangladesh' *Asian Survey* 40(2000): 530-50; Harry Blair, 'Party Overinstitutionalization, Contestation and democratic degradation in Bangladesh', in *Handbook of South Asian Politics*, ed. Paul Brass (London: Routledge, 2010); Rouaq Jahan, 'Bangladesh in 2003: Vibrant Democracy or Destructive Politics?', *Asian Survey*, 44 (2004) 56-61.

accountability, exclusionary and confrontational politics, and partisan use of the Judiciary and law enforcement agencies are seen to originate from the unbridled power exercised by the government of the day. This power is used to harass the opposition and to force them to resort to 'politics of the street' to make their voice heard.<sup>75</sup>

Sobhan argues that the principal feature of Bangladesh's democratic politics is the emergence of a stable two-party system with power alternating between the Bangladesh Nationalist Party and the Awami League. This bipolar system has contributed to the confrontational style of politics, which is undermining the working of the parliamentary system.<sup>76</sup> The duopolistic dominance of the two major parties, he argues has 'encouraged their insensitivity to the concerns of minor parties, their direct supporters, their voters and even to the concerns of their party rank and file'.<sup>77</sup> He further writes that, 'over...successive parliaments, the majority parties have denied equitable time-sharing with the opposition both in parliament as well as over the official electronic media. Nor have successive regimes made any more than token attempts to consult the opposition on issues of policy and governance.'<sup>78</sup> The sense of arrogance within the leadership of both parties is premised on the belief that within the duopolistic system the voters have no option but to vote for one party or the other. The immediate result of this 'hegemonistic perspective' of the two dominant parties, according to Sobhan, has been to perpetuate the exclusionary exercise of parliamentary power by both the Awami League and the Bangladesh Nationalist Party.<sup>79</sup>

This exclusionary mode of politics is seen as one of the primary reasons for driving the opposition out of the parliament and onto the streets, the end result being a

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<sup>75</sup> Akhter Hossain, 'Anatomy of Hartal Politics in Bangladesh', *Asian Survey*, 40 (2000): 508-529

<sup>76</sup> Rehman Sobhan, 'The Political Economy of Malgovernance', Centre for Policy Dialogue, 2007, Dhaka.

<sup>77</sup> Sobhan, 'Structural Dimensions of Malgovernance in Bangladesh' 4103.

<sup>78</sup> Sobhan, 'Structural Dimensions of Malgovernance in Bangladesh', 4103.

<sup>79</sup> Sobhan, 'Structural Dimensions of Malgovernance in Bangladesh', 4103.

dysfunctional parliament and political violence.<sup>80</sup> Moniruzzaman argues that throughout the democratic era (since 1991) very few policy issues have been fully and constructively discussed on the floor of the house.<sup>81</sup> Parliamentary debate has rather been characterized by incendiary and personalized rhetoric. Successive oppositions complain that they were not given time to discuss vital issues, or that the Speaker was biased against them. These procedural wrangles invariably end in walkouts and boycott of the parliament by the opposition.<sup>82</sup> Thus, for these scholars, the parliament in Bangladesh has failed as the principal institution of parliamentary democracy and as the focal point of politics in Bangladesh.

The failure of the parliament gives rise to the perceived failure of another central institution of democracy: the opposition. Shifting the locus of politics from the parliament to the streets is widely seen to be a failure of the opposition in questioning the executive. This prevents the opposition from fulfilling their role as ‘fire-alarm controls’ in holding the executive accountable for its actions.<sup>83</sup> An impotent opposition is therefore another criticism levied against Bangladeshi democracy, where it is argued that the government has effectively been taken ‘off the hook’ in having to respond to an informed, vigilant and present opposition on a daily basis. This in turn is part of a larger concern of a general lack of accountability in Bangladeshi democracy.

Institutions of accountability are particularly weak in Bangladesh and are either absent or underdeveloped. The report by BRAC on the state of governance in Bangladesh identifies weak horizontal legislative accountability. There is lack of accountability and

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<sup>80</sup> Mohammed Moniruzzaman, ‘Party Politics and Political Violence in Bangladesh’ *South Asian Survey* 16 (2009) 91-92.

<sup>81</sup> Mohammed Moniruzzaman, ‘Parliamentary Democracy in Bangladesh: An Evaluation of the Parliament during 1991-2006’, *Commonwealth and Comparative Politics*, 47(2009) 102-106.

<sup>82</sup> Moniruzzaman, ‘Parliamentary Democracy in Bangladesh: An Evaluation of the Parliament during 1991-2006’, 116.

<sup>83</sup> Nizam Ahmed, ‘From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973-2001)’, *Pacific Affairs*, 76(2003) 55-77.

questioning of the government from the opposition and members of parliament; Parliamentary Oversight Committees are largely restrained by lack of formal authority; Non-elective constitutional bodies of horizontal accountability such as the Anti-Corruption Commission, which was started by the government largely under pressure from the international donor community, remain non-functional and ineffective.<sup>84</sup> This is further compounded by a lack of formal accountability mechanisms within the judicial system.<sup>85</sup> Reports on the Judiciary, including separate ones compiled by Asian Development Bank,<sup>86</sup> United Nations Development Program<sup>87</sup> and BRAC, illustrate that:

[j]udges are not accountable for the efficiency or lack thereof of their performance... Corruption in key justice institutions, most notably the lower courts and the police force, is a serious problem. Practices of requiring informal payments for basic services effectively blocks access to the criminal justice system by the poor.<sup>88</sup>

As far as accountability in justice institutions and government agencies are concerned, petty corruption is identified as only the tip of the iceberg. The Judiciary is seen to be politically motivated because of partisan and patronage appointments and recruitment distorting initiatives, weakening service delivery and undermining governance through marginal rule of law.<sup>89</sup>

The issue of patronage appointments brings us to the main assertion by experts on democracy in Bangladesh, that of partisan politicization permeating all aspects of public

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<sup>84</sup> BRAC, State of Governance in 2006, 63.

<sup>85</sup> See generally, Bari, Ehteshamul, 'The Natural Death of the Supreme Judicial Commission of Bangladesh and the consequent patronage appointments to the bench: Advocating the establishment of an independent Judicial Commission', *International Review of Law*, 1 (2014).

<sup>86</sup> Asian Development Bank, 'Overview of Corruption within the Justice Sector', 2006.

<sup>87</sup> United Nations Development Program, 'Bangladesh Judicial Strengthening Project Report', 2004.

<sup>88</sup> BRAC, State of Governance in 2006, 63.

<sup>89</sup> Bari, 'The Natural Death of the Supreme Judicial Commission of Bangladesh'.

life, including public institutions whose rules or mandate forbid party affiliation (including the Election Commission and the Judiciary).<sup>90</sup> This is an underlying theme across the literature on democracy and governance in Bangladesh. Whether different authors attempt at tackling the issue head-on like the BRAC report, which conducts detailed surveys on recruitment procedures in the Bangladesh civil service, the judiciary and the police force; or whether they describe it through the patrimonial patron-client nature of Bangladeshi politics and society in general,<sup>91</sup> the end result is identified as a distortion of incentives for government agents, whereby they do not have incentives to follow the formal rules of the system but rather function in partisan, particularist and politicized ways. Sobhan identifies the governance issues in Bangladesh as ‘structural’, meaning that they have become embedded in the social and political forces governing the country.<sup>92</sup> Peters and Pierre note that there is no single method of politicization and that the term generally has a negative connotation in democratic societies.<sup>93</sup> According to the World Bank, while politicization in industrialized democracies implies attempts to control policy and implementation, in less developed countries it takes the form of patronage, i.e. politicization happens through supplying jobs to party members or members of the family or clique. In some of these cases, the civil servants believe political activity is the best way to advance their careers.<sup>94</sup>

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<sup>90</sup> Ferdous Jahan, ‘Public Administration in Bangladesh’, Centre for Governance Studies, BRAC University, Dhaka, 2006.

<sup>91</sup> See, Stanley Kochanek, ‘The Rise of Interest Politics in Bangladesh’, *Asian Survey* 36 (1996): 704-722; Kochanek, ‘Governance, Patronage Politics and Democratic Transition’; Mushtaq Khan, ‘Bangladesh: Partitions, Nationalisms and Legacies for State Building’, Department of Economics, SOAS, University of London, 2010 (Unpublished).

<sup>92</sup> Sobhan, ‘Structural Dimensions of Malgovernance in Bangladesh’, 4101-4108.

<sup>93</sup> Guy Peters and Jon Pierre, *‘Politicization of the Civil Service in Comparative Perspective: the quest for control’*, (London: Routledge, 2004). 2-4.

<sup>94</sup> Nick Manning, Ranjana Mukherjee and Omer Gokcekus, ‘Pragmatic Approaches to Patronage’, World Bank Poverty Reduction and Economic Management Network, 2001.

Lewis writes that, 'patron-client relations are a cornerstone of society in Bengal, combining political, economic and religious elements of social organization.'<sup>95</sup> Meanwhile, Kochanek notes that all households need to negotiate reciprocal exchanges 'in which people of higher rank are accorded the right to extract labour, services, and respect from people of lower rank',<sup>96</sup> a phenomenon which creates a hierarchical web of dyadic relationships and mutual obligations. Adnan Khan describes how village-level patron-client factions in Bangladesh compete for access to state distributed resources.<sup>97</sup> He also shows how successful patrons have to be able to distribute these.<sup>98</sup> Therefore local-level patrons must maintain good relations with patrons at higher levels controlling the state.<sup>99</sup> Similarly, poor clients also depend on and must maintain good relations with patrons. While he observed relief distribution in Bangladesh Devine noted that 'the right kind of relationship with the right kind of people seems to be what really makes things happen'.<sup>100</sup> He goes on to note that the clients themselves (the relief beneficiaries) do not view these relationships as exploitative, while those who got excluded (usually opposition supporters) view the patronage based distributions as unfair and cruel.<sup>101</sup> Thus, scholars of Bangladesh agree that the entire society is structured around a complex network of patron-client relationships, which have both economic (jobs, credit) and political (protection) aspects.

Khan argues that the problem of democracy and institution building in Bangladesh has to be seen in the context of the country's 'clientelistic political settlement'.<sup>102</sup> He goes

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<sup>95</sup> David Lewis, *"Bangladesh: Politics, Economy and Civil Society"*, (Cambridge: Cambridge University Press, 2011) 99.

<sup>96</sup> Kochanek, 'Patron-Client Politics and Business in Bangladesh', 44.

<sup>97</sup> Khan, 'State and Village Society: Political Economy of Agricultural Development in Bangladesh', South Asia Books, December 1989.

<sup>98</sup> Khan, 'State and Village Society'.

<sup>99</sup> Khan, 'State and Village Society'.

<sup>100</sup> Devine, 'Governance, Democracy and the Politics of Well-Being', 12.

<sup>101</sup> Devine, 'Governance, Democracy and the Politics of Well-Being', 12.

<sup>102</sup> Khan, 'Class, Clientelism and Communal Politics in Contemporary Bangladesh', 16.

further in his analysis of clientelism as not only exchanges between individual leaders and their clients, but rather describes the factions that work within a pyramid structure in clientelistic political settlements.<sup>103</sup> Political parties form the top of the pyramid while the base is formed by groups and classes created through a series of patron-client networks, which penetrate all levels and sectors of society.<sup>104</sup> In clientelistic societies patron-client networks are mechanisms through which power is exercised. The typical patron is an organizer of power and organizes groups of clients. Clients offer their support to the organization in exchange for benefits that the patron offers.

Khan describes patron-client politics as a system of politics in which the common feature is the personalization of politics by faction leaders and the organization of politics as a competition between factions. The personalization of leadership is not based on traditional deference or the greater susceptibility of developing country societies to charisma. It is rather a 'modern' phenomenon in that faction leaders offer payoffs to those who support them. In turn, they capture the resources for making these payoffs by mobilizing their supporters in factions.<sup>105</sup> Khan further observes that the grassroots, or the people at the bottom of the pyramid, are not interested in the ideology of the political parties but rather make rational calculations about material outcomes. According to Khan, one of the reasons for the enduring nature of clientelism is that in developing countries clients recognize that the small gains to be made from factional allegiance and patron loyalty (such as a retainer payment for physical protection) are still likely to outweigh those that might arise from class-based political action. About Bangladesh, he writes:

These basic patron-client factions are ubiquitous and range from neighbourhood

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<sup>103</sup> Khan, 'Class, Clientelism and Communal Politics in Contemporary Bangladesh', 17-18.

<sup>104</sup> Khan, 'Class, Clientelism and Communal Politics in Contemporary Bangladesh', 17-18.

<sup>105</sup> Mushtaq Khan, 'Markets, States and Democracy: Patron-Client Networks and the case for Democracy in Developing Countries', *Democratization*, 12(2005) 712.

groups led by petty mafia bosses known in Bangladesh as mastaans to village factions led by somewhat more respectable matabbars, dalals and upazila chairmen.... Bargaining power depends on the number of people who can be occasionally mobilized by the faction for elections... local level enforcement networks, organizing civil protests, demonstrations...and other forms of activity which aim to inflict costs on those who refused to make deals or offer payoffs to that faction.<sup>106</sup>

Ruud similarly discusses the violence that political activists engage in and traces back the relationship between criminals and politicians in Bangladesh to the years after the 1971 war of independence.<sup>107</sup>

According to Lindberg sustenance of these neo-patrimonial relationships take regular flows of resources from leaders to followers.<sup>108</sup> To sustain themselves, leaders are compelled to extract resources from all sources including the state, kin and followers, as loyalty from their clients is dependent on distribution of such resource. The patron-client mode of politics tends to monopolize resources, as the nature of the institution makes it fundamental that patrons are able to distribute resources. The more resources the patron has access to, the stronger is his or her support base. This turns politics into a zero-sum struggle for control of the state, which becomes the key to economic advantage, thus in turn making elections a zero-sum game. Clapham states this by writing ‘when there is no money, there is no patronage and no loyalty in this kind of system’.<sup>109</sup> This researcher conducted 40 semi-structured elite interviews with relevant actors including 13 past and

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<sup>106</sup> Khan, ‘Class, Clientelism and Communal Politics in Contemporary Bangladesh’, 17.

<sup>107</sup> Arild Engelsen Ruud, ‘The Political Bully in Bangladesh’, in *Patronage as Politics in South Asia*, ed. Anastasia Piliavsky (Cambridge: Cambridge University Press, 2014).

<sup>108</sup> Steffan Lindberg, ‘It’s our time to “Chop”: Do Elections in Africa feed Neo-Patrimonialism rather than Counter-Act it?’, *Democratization*, 10(2003) 127.

<sup>109</sup> Christopher Clapham, ‘Democratization in Africa: Obstacles and Prospects’, *Third World Quarterly*, 14 (1993) 427.



present parliamentarians from various political parties. Each of these Members of Parliament expressed the view that voters and party leaders have certain patronage expectations that have to be met by the Member of Parliament and political parties in order for re-election. For example, according to one of the founding members of the Bangladesh Nationalist Party:<sup>110</sup>

*[T]here are also benefits that they (the voters) get out of being attached to a particular political party, we call it... sweets and bread, in very plain language... I mean the favor that you dole out to whoever is a worker. It's very unfortunate to say these things but those who become leaders... supposing in my constituency, if I have, say, about 25 leaders who I would count as close to me, they would expect that I would give them some facility, either in the form of, say, business, or put their relations somewhere in jobs here and there...*<sup>111</sup>

Thus, the necessity to engage in informal behavior that weakens formal institutions stems from the need to capture state resources and also leads to the politicization of the administrative system, so that the executive can rely on the bureaucracy to support its patronage structures. Horizontal accountability is affected - First, situations where constituents are in difficulty with parts of the state apparatus outside of their elected representatives ambit may give rise to patterns of mutual favours between elected officials and/or between elected officials and administrative staff. Second, Members of Parliament or other elected officials spend hours every day attending to the time-consuming task of maintaining their personal clientelistic networks. It is common in Bangladesh to see queues of constituents outside Members of Parliament homes each morning, and the Member of Parliament spending the entire morning having tea with each constituent whilst attempting to solve their difficulties (this may be in the form of job requests or school recommendations, small amounts of cash, phone calls to different

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<sup>110</sup> Interviewee V.

<sup>111</sup> Interview V. Translations are the author's own.

arms of the administrative service etc). Often Member of Parliament's reside in Dhaka (Parliament being located in the capital) and constituents have travelled far from their villages and spent essential money on travel, thus depending on private help from their Member of Parliament, in fact expecting it as their 'right'. Members of Parliament need to attend to their constituents who are the basis for their power. In effect, Members of Parliament are unable to allocate a sufficient amount of time and energy to attend Parliament, think through rule making, or hold other elected officials accountable. In fact, even if Members of Parliament were to make independent and studied decisions, they would still have to vote on legislation in line with the party – or in other words in line with the decision of the leader of the party. Article 70 of the Bangladesh Constitution prohibits floor crossing by the Members of Parliament. This has far reaching consequences on accountability and the proper role of Parliament as the watchdog that keeps the executive in check.<sup>112</sup>

On the other hand, the clientelistic structure of politics means that local governments are also not being given responsibility or are being unable to function as the Member of Parliament gets involved in what is meant to be the job of the chairman of the districts and sub-district.<sup>113</sup> Badiul Alam Majumder writes that 'In Bangladesh, Members of Parliament play a large and increasingly controversial role in local affairs'.<sup>114</sup> Thus, overall accountability within the society is weakened. During an interview with a Member of Parliament, the researcher was told:

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<sup>112</sup> Sabbir Ahmed, 'Article 70 of the Constitution of Bangladesh: Implications for the Process of Democratisation' (2010) 24 *Bangladesh Institute of International and Strategic Studies*.

<sup>113</sup> There are 63 districts in Bangladesh, each further divided in Upazila (sub-district) or thana (police station). The thana is divided into Unions (wards), each of which have direct elections for chairmen.

<sup>114</sup> Badiul Alam Majumder, *Local Governance and Key Political Reform: Keys to Poverty Reduction* (Dhaka: Agamee Prakashani, 2010) 34.

*The biggest thing is that we are Members of Parliament, our responsibility is to sit in Parliament, to make law, to speak for you... but they (voters) don't care about these things. The voters expect the MP to do the job of a chairman.. that the MP will sit their and get people married, find them jobs, file violence against women cases, decide on who had what stolen. The voters want to see me as soon as they wake up, they want that I will do dispute resolution, but excuse me I am not supposed to be there, I am supposed to be at the Parliament making law.. so you know you can't change it.. you cannot change this... this is why local government is failing. Our constitution strongly provides for local government... but what does local government do? For example, I hate my Upazila chairman... it's not just me all the Members of Parliament do that... you know why? Because if you give responsibility for all local development to the Upazila chairman then he becomes greedy... let me tell you how... say that he is making the road, the ghat.. he is doing this, he is doing that... he has the access to directly go to my constituent...one to one, first hand... so when he is handing you 20 kgs of rice, or handing you your relief card.. you are a timid member of society, you don't care what super speech the Member of Parliament gave in the Parliament... you are like he (the chairman) is the man... the one who is handing me my relief card in my time of trouble... so he becomes greedy that at the next election I am going to run... pass a law tomorrow that Upazila chairmen cannot run for national elections for ten years, he will be my buddy... because he takes half my headache... then I will say brother the job of fixing roads and ghats is the duty of the Upazila chairman...one to one service is the responsibility of the Upazila chairman... my duty is to make law and to see whether that has been implemented... but that's not happening...*<sup>115</sup>

Thus, the necessity of monopolizing state resources by the executive in order to maintain its patronage networks result in interference by the executive in different branches of government that are meant to be separated.

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<sup>115</sup> Interview B. Translations are the author's own.

This brings the literature review back full circle to the first point I listed as the most commonly identified problem with Bangladeshi politics – the complete centralization of power in the hands of the executive. With politicians who are widely perceived to be corrupt and rent-seeking,<sup>116</sup> and widespread partisan politicization of all spheres of public life, it is not surprising that the unbridled power of the executive has come to be seen as a debilitating factor in Bangladeshi politics, contributing to an ‘illiberal mode of rule’.<sup>117</sup>

As Blair notes:

[e]lection winners take all political power, leaving nothing for the opposition party. Once in power, the ruling party enjoys the mandate to do essentially whatever it wants over the next five years, which generally means fostering corruption, skimming foreign aid, diverting contracts to relatives, etc. The police become a political arm of the ruling party, which uses them to harass the opposition, break up opposition rallies while protecting their own, and so on.<sup>118</sup>

Given the above phenomenon of executive interference in institutions of accountability through informal means and its affect on democratization, it is very important to study the nature of these informal processes, and how the executive is able to manipulate formal institutions to serve particularized goals, as this thesis does through the study of electoral institutions.

The literature on elections in Bangladesh is limited and since the fall of authoritarian regimes and the emergence of competitive politics in Bangladesh in 1991, very few

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<sup>116</sup> A study of corruption in Bangladesh undertaken by Almas Zakiuddin for Transparency International titled ‘Corruption in Bangladesh: An Analytical and Sociological Study’ (date unknown) revealed a pervasive experience of bribery in dealings with the judiciary, police, and the educational system, and around 62% of respondents blamed elected officials for such practices. Also see public opinion polls regarding politicians in Saad Andaleeb and Zachery Irwin, *Political Culture in Bangladesh* (Dhaka: Journal of Bangladesh Studies, 2004).

<sup>117</sup> See BRAC State of Governance 2006, 13.

<sup>118</sup> Blair ‘Party Overinstitutionalization, Contestation and democratic degradation in Bangladesh’, 104.

academic studies have been conducted on elections and electoral laws in Bangladesh. Electoral reform is an area that has been particularly sidelined, primarily because there has been no direct electoral reform until 2008, when the Election Commission introduced major reforms under the Non-Party Caretaker Government. Influential international election monitoring bodies reported on the 2007-2008 reforms as well as the 2008 election.<sup>119</sup> Local think tanks and election monitoring bodies such as the Fair Election Monitoring Alliance, Brotee and Shushashoner Jonno Nagorik (SHUJAN) have also prepared studies and reports. However there are no studies on the fate of the 2007-2008 reforms. Nor are there any studies on de facto electoral reform prior to the 2008 report or since, via constitutional amendments, judicial decision-making or changes in appointment processes. This dissertation takes another look at legislative reforms brought about by the Caretaker Government of 2007-2008 and further goes on to show that they have not been implemented properly because of informal institutions. The dissertation also looks at other forms of electoral laws such as constitutional amendments, judicial decision making, appointment process, internal directives of the Election Commission, and informal patronage based rules in order to provide an in depth understanding of the background conditions of the electoral legal process in Bangladesh. The case studies in this research highlight how the processes of electoral law making and law implementation have become partisan and personalized. The study further identifies these processes as attempts to give an advantage to the incumbent in national elections. Structures of patronage and clientelism that the society is dependent on have allowed for the politicization of electoral reform and implementation of electoral rules through weakened institutions of accountability.

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<sup>119</sup> These International election monitoring bodies and think tanks included the National Democratic Institute (NDI), the Asia Foundation, the Commonwealth Observer Group, Transparency International Bangladesh (TIB), the United Nations Development Program (UNDP), the Asian Network for Free Elections (ANFREL).

A survey of the literature on elections in Bangladesh reveals a need for academic research in the area of electoral legal reform and its relation to other formal institutions and informal institutions. Most of the literature on electoral laws and reforms in Bangladesh has come from NGOs or through articles, editorials and sub-editorials, which occasionally appear in various newspapers and magazines. The only notable publication on electoral reform in Bangladesh in English is authored by past Election Commissioner, Sakhawat Hussain, titled 'Electoral Reform in Bangladesh 1972-2008'.<sup>120</sup> While this book states 1972-2008 in its title, the study is actually limited to the reform initiatives taken by the Election Commission between 2007 and 2008. Further, it does not shed light on the effectiveness of the reforms or the attitude of political parties towards these reforms. This is arguably because the reforms of 2007 and 2008 took place under emergency rule and a Caretaker Government, a period when the usual rules of politics were suspended and there was little scope for politicized reforms at the time. The study is also limited to 2012 and therefore does not shed light on how the 2007-2008 reforms fared under a political government. While the book does an excellent job of listing all the reforms until 2008, it does not illustrate how effective they have been or how they interact with informal institutions. Further, the abolition of the Caretaker Government in 2011 and what this means for elections and democratization in Bangladesh have not been analyzed.

Other publications that touch upon electoral reform include Akhter's 'Electoral Corruption in Bangladesh'.<sup>121</sup> Akhter focuses on the use of electoral corruption in order to rig elections and legitimize regimes in Bangladesh, but does not touch on how formal institutional weakness and informal institutions can lead to distortion of formal rules. He

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<sup>120</sup> Shakhawat Hussain, *Electoral Reform in Bangladesh 1972-2008*, (Dhaka: Palok Publishers, 2012). There is a version of the book also written in Bengali titled 'Nirbachon Commission Pach Bochor', (Dhaka: Palok Publishers 2012).

<sup>121</sup> Yeahia Akhter, *Electoral Corruption in Bangladesh*, (London: Ashgate, 2001).

further uses each election to date as separate events and highlights electoral corruption at each election, in the same vein as election observer reports. There is little analysis of the role of formal institutions mandated to strengthen elections and electoral law. Rahman's book titled 'Bangladesh Election 2008 and Beyond' reviews the reforms undertaken by the Caretaker Government and recommends further reforms that can be installed by elected governments for the sustainability of these reforms.<sup>122</sup> The book only looks at formal reform and gives recommendations, but does not have any analysis on the process of rule making and rule implementation with which this dissertation is concerned. Other leading authors include Karim, Singh and Alim, who focus on areas such as the Caretaker Government, political parties and a general discussion of democratization, respectively. Despite their importance, these pieces of research do not touch upon how the executive utilizes formal institutions through informal means to manipulate the electoral legal framework and its implementation.

While there are a number of studies on the nature of patron-client relations in Bangladesh, most of these are limited to the study of local level patronage between villagers and local *mattobbars* (what leaders are mockingly called), or between political faction leaders and lower level party supporters.<sup>123</sup> This study is an attempt to fill the gap in the literature in relation to the role of informal institutions within constitutionally mandated bodies by making a case study of formal electoral institutions. The literature on elections in Bangladesh covers some informal institutions (particularly clientelism and corruption) and show how patron-client politics and clientelism are manifested in the electoral arena in terms of the relationship between politicians, voters and political middlemen as discussed above. They further demonstrate how the strength of factions

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<sup>122</sup> Rahman, 'Bangladesh Election 2008 and Beyond'.

<sup>123</sup> See, Khan, 'Patron-Client Networks and the Case for Democracy' and Devine, 'Governance, Democracy and the Politics of Well-Being'.

determines the strength of political parties.<sup>124</sup> However, to date, scholars of democratization, elections and informal institutions in Bangladesh have largely ignored the exploration of informal rules and institutions in the interaction between elite actors involved in the electoral arena and the role and effect of informal processes within formal institutions. Particularly, how these informal relationships between elite participants affect electoral rule making and rule implementation has not been explored. In studying the electoral process, scholars have either focused on highlighting weaknesses in the regulatory framework (such as institutional independence of the Election Commission) or on electoral corruption (i.e. bribery, vote buying, threats, rigging, etc.). Scholars such as Bari and Ahmed have studied the relationship between different arms of government such as the executive and the judiciary or Prime-Ministerial control over Parliamentary Committees and have highlighted the infiltration of informal institutions.<sup>125</sup> However, Bari and Ahmed have not studied these constitutional bodies and formal institutions from the lens of elections; nor have they discussed specific cases or examples of informal behaviour in detail, and the end result of these informal norms (this author contends that the end result in the distortion of electoral law making). This research attempts to showcase that clientelism, particularism or personalization of politics in Bangladesh is present not only between politicians and voters but also between politicians, the bureaucracy and other actors involved in constitutional institutions resulting in weak separation of powers and political violence.

The next chapter discusses the methodology applied to study informal norms within formal institutions in Bangladesh, and explains why the researcher chose certain methods over others.

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<sup>124</sup> See generally, Khan, 'Class, Clientelism and Communal Politics in Contemporary Bangladesh'.

<sup>125</sup> Bari discusses executive interference in the judiciary, while Ahmed discusses the relationship between the executive and the legislative. Please see, Nizam Ahmed 'Parliament-Executive Relations in Bangladesh', *The Journal of Legislative Studies*, 3 (1997) 70-91; and Ehteshamul Bari, "The Natural Death of the Supreme Judicial Commission of Bangladesh".



## Chapter 3 – Methodology

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### 3.1. Introduction

This chapter is a description of the methodology deployed in this dissertation and attempts to answer Murcott's key questions for qualitative methodology.<sup>1</sup> These questions are: how was the research undertaken/ how did the researcher go about the research? What was the overall strategy adopted and reasons for the strategy? What were the techniques used for the research and what were the reasons behind choosing those specific techniques and not others? This study adopts a combination of qualitative research methods in gathering and analyzing relevant data. These methods include case studies, literature review, archival research, doctrinal analysis, historical analysis and semi-structured qualitative elite interviews.<sup>2</sup> The analysis draws upon both primary and secondary sources. This is a socio-legal analysis that proposes that the institutional dualism created by the existence of an informal governance system creates a gap between the realm of the formal law and the realm of the social. The qualitative research methods deployed, particularly the elite interviews, allows the researcher to understand the topic from the perspectives of key Bangladeshi stakeholders involved in the electoral process. The researcher conducted an in-depth study of the background conditions of the cases highlighted in this dissertation in order to illustrate how each of them in some way or another were influenced by informal institutions, relationships and rules. The study is ethnographic and relies strongly on knowledge gained in the field. This allows a presentation of specific incidents of informal behavior within formal institutions in Bangladesh and the perceptions of local stakeholders, thereby contributing to a deeper

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<sup>1</sup> David Silverman 'Doing Qualitative Research', (London: Sage, 2010) 334.

<sup>2</sup> See generally, Natasha Mack, Cynthia Woodsong et al, 'Qualitative Research Methods: A Data Collector's Field Guide', USAID, 2005 and Paul Nkwi, Isaac Nyamongo and Gery Ryan, 'Field Research into Socio-Cultural Issues: Methodological Guidelines', Washington DC, UNESCO, 2001.

understanding of the role of informal institutions within formal, constitutional institutions and their consequences for elections.

### 3.2. Qualitative Case Studies

Qualitative case study allows for incorporating the specificities of the processes being studied while employing concepts derived from a broader range of theoretical and empirical literature. According to Goldstone and Gerring, qualitative case studies allow the use of extant theoretical frameworks to define variables and processes of interest while at the same time allowing for the empirical testing of the hypothesis.<sup>3</sup> Case studies are also better geared to answer the ‘causes of effects’ by using a single or small group of cases in comparison to quantitative research methodologies, which are better at determining the ‘effects of causes’ across a relatively large number of cases.<sup>4</sup> The case study methodology enables the in-depth examination of a particular event/occurrence/incident, circumscribed by boundaries such as time and geography, allowing for a variety of analytical tasks to be performed such as the testing and reinforcement of existing hypotheses and the establishment of new causal claims. Qualitative case studies have been criticized for selection bias and their inability to generate propositions with a wide range of applicability.<sup>5</sup> Despite this criticism, the researcher of this PhD decided to utilize case study methodology because of their sensitivity to context and because of their ability to examine specific events, background conditions and outcomes allowing for validation of concepts.

Given the focus of this study on Bangladesh and the formal institutions involved in the electoral process, case studies allow for an in depth examination of the processes and

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<sup>3</sup> John Gerring, ‘What is a Case Study and What is it Good For?’, *American Political Science Review*, 98 (2004) 341-354.

<sup>4</sup> Andrew Bennett and Elman Colin, ‘Qualitative Research: Recent Developments in Case Study Methods’, *Annual Review of Political Science*, 9 (2006) 455-476.

<sup>5</sup> Davis Collier, and James Mahoney, ‘Insights and Pitfalls: Selection bias in Qualitative Research’, *World Politics*, 49 (1996) 56-91.

motivations underlying electoral law reform and law implementation. While the larger case study in this dissertation is Bangladesh and electoral reform in Bangladesh, further divisions and levels such as analysis of the legislative process, particularly constitutional amendment process, narrowed down to the analysis of amendments to one particular provision (Caretaker Government) allows for focusing on further divisions and levels in a funnel pattern, greatly expanding the explanatory power of this research project, especially in the context of current research available on electoral rule making in Bangladesh.

### **3.3. Archival Research<sup>6</sup>**

The researcher conducted archival research in Dhaka and had access to original petitions submitted to the Supreme Court, letters exchanged between political parties and Special Committees on Constitutional Amendment, minutes of Special Committee meetings, minutes of Election Commission meetings and minutes of Parliamentary proceedings. The researcher was able to access archival documents of the *Jatiyo Sangsad* through contacts made via the interviewees. The researcher also had access to the archives of the Election Commission through her contacts with past and present Election Commissioners and was able to access reports of discussions between the Election Commission and political parties on electoral reform. She was able to study in the archives/libraries of various law firms and thereby had access to their case files. The author did archival research on all the major case law analysed in this dissertation and had access to original petitions submitted to the court(s). Very few researchers will have access to the above documents, particularly original petitions submitted by lawyers to the court, as these are not available in public record anywhere. Many of these documents

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<sup>6</sup> See generally, Laura Schmidt, 'Using Archives: A Guide to Effective Research', *Society of American Archivists*, <<http://www2.archivists.org/sites/all/files/UsingArchives.jpg>> (Accessed on 9 September 2015).

were available only in Bengali and the researcher has translated them into English. Thus, original sources have been consulted and analysed for the purpose of this research and in order to show the gap between formal and informal institutions in Bangladesh.

### **3.4. Analysis of the Bangladesh Electoral Framework**

Along with other qualitative research methods, this research project has also employed the most traditional and dominant mode of legal scholarship by undertaking critical doctrinal analysis<sup>7</sup> of the relevant Constitutional provisions, Constitutional Amendments (13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendment), Rules of Procedure of Parliament and the election laws of Bangladesh. These include the Representation of the People (Amendment) Order (2009), The Representation of the People Order (1972), The Conduct of Election Rules (2008), Member of Parliament (Determination of Dispute Act) (1980), The Code of Conduct for Parliament Elections (2008), Political Party Registration Rules (2008), The Electoral Rolls Act (2009), Election Commission Secretariat Act (2009) and Independent Candidate Rules (2011). This analysis has been undertaken to determine the extent to which these provisions allow for free, fair, participatory elections with administrative efficacy. Further primary sources such as Committee Reports, Election Commission reports, letters between political parties and committees, letters received by enumerators from higher Election Commission officials, to which the researcher has had exclusive access, have also formed the basis for analyzing how informal institutions and patronage behavior seep into formal rule making. Analysis of secondary sources such as government and election monitoring agencies and media reports has been undertaken to study the kind of reforms being made and the effectiveness of these laws in promoting better elections.

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<sup>7</sup> See generally, Richard Posner, 'The Present Situation in Legal Scholarship', *Yale Law Journal* 90 (1980) 1113-1130 and Terry Hutchinson and Nigel Duncan, 'Defining and Describing What we Do: Doctrinal Legal Research', *Deakin Law Review*, 17 (2012) 83-119.

### 3.5. Appraisal of Relevant Case Law

Challenging the state in the form of writ Petitions and Public Interest Litigation is now a common phenomenon in Bangladesh and there is a large range of election related cases that have been decided by the Supreme Court of Bangladesh. The Chancery Law Chronicles lists 168 election related cases<sup>8</sup> decided by the Supreme Court. The researcher studied the landmark election related decision as set out in the Chancery Law Chronicles and chose the cases discussed in this dissertation for their ability to highlight the workings of informal institutions. The facts and judicial decisions of these cases help support the researcher's contention that while the electoral laws are substantive, their implementation by the executive is questionable and that executive interference in constitutional bodies continues to affect electoral law making and democratic consolidation in Bangladesh. The landmark decisions that are used as case studies in this dissertation include the following:

#### *3.5.1. MA Jalil v Bangladesh and Advocate Rahmat Ali and another v Bangladesh*<sup>9</sup>

These petitions had challenged the constitutionality of the Electoral Commission's manner of preparation of the electoral roll (or voters' list) for what was to be the 9<sup>th</sup> parliamentary election. The issue was whether, in preparation for the ensuing parliamentary election, the Election Commission had the authority to prepare a 'fresh' voters' list separate from the existing list, or, whether it was required to modify the existing list. Two of the three Election Commissioners, AKM Munsef Ali and Mohammad Ali, however, alleged that they had not approved the preparation of a 'fresh'

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<sup>8</sup> Chancery Law Chronicles (Chancery Law Chronicles is the first Bangladeshi online case law database).

<[http://www.clcbd.org/judgment/search.html?q=election&Judgment%5Bsearchphrase%5D=all&Judgment%5Bordsearch%5D=newest&Judgment%5Bcourt\\_name%5D=&yt0=Advanced+Search](http://www.clcbd.org/judgment/search.html?q=election&Judgment%5Bsearchphrase%5D=all&Judgment%5Bordsearch%5D=newest&Judgment%5Bcourt_name%5D=&yt0=Advanced+Search)> (Accessed on 2 September 2015).

<sup>9</sup> 11 BLC (2006) 380.

voters' list and the Chief Election Commissioner had taken the decision without consulting them. The author also relied on interview with the lawyers of the petitioners and members of the Election Commission (past and present commissioners) to provide further insight in to the nuances of the case.

### ***3.5.2. Abdul Momen Chowdhury and Others v Bangladesh<sup>10</sup> and Abu Safa v Election Commission<sup>11</sup>***

These decisions confirmed the mandatory disclosure of eight types of personal information by electoral candidates, which include academic qualifications, any criminal charges, sources of income and description of assets and liability. The author also interviewed the executive director of the NGO, Shushashoner Jonno Nagorik, which initiated the case for mandatory disclosure and also interviewed the lawyers of both the appellants and the defendants. A study of the background conditions of these decisions show how the Judiciary has been behaving statist, perhaps as a result of patronage based appointments.

### ***3.5.3. Abdul Mannan Khan v Bangladesh<sup>12</sup>***

In 2011, the Appellate Division of the Supreme Court of Bangladesh (the Bangladesh Supreme Court constitutes of the High Court Division and the Appellate Division) declared the Non Political Caretaker Government provision and therefore the 13<sup>th</sup> Amendment to the Constitution unconstitutional, on the grounds that it violated the basic structure of the Constitution, namely democracy, because the interim government is an unelected one.<sup>13</sup> However, the Court also held that the Caretaker Government provision should be kept in place for the next two parliamentary elections in order to maintain peace and stability in the country. The study of how Parliament used this

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<sup>10</sup> 2007, 36 CLC (AD) (8693).

<sup>11</sup> 2007, 36 CLC (AD) (8693).

<sup>12</sup> 64 DLR (AD) 169.

<sup>13</sup> *Abdul Mannan Khan v Bangladesh*, 64 DLR (AD) 169.

judgment in order to lend credibility and defended the 15<sup>th</sup> amendment to the Constitution, which abolished the Caretaker government system, highlight how formal institutions and processes are utilized in order to pass politicized legal reform.

#### ***3.5.4. Albaj Aminul Bhuiyan v Bangladesh and Others*<sup>14</sup>**

On 21 May 2006, a High Court Division Bench of the Supreme Court with Special Jurisdiction gave an order issuing a rule nisi. The rule nisi required the government of Bangladesh, the Ministry of Law, Justice and Parliamentary Affairs, The Election Commission and others to show cause as to why their direction to the Assistant Registration Officer for Ward No. 41 under Mohammadpur Police Station to enlist 900 voters not included in the voter list and appoint Atiqul Islam as enumerator should not be declared to be without legal authority and unconstitutional. Upon investigation it turned out that the 900 names were of non-existent voters. Atiqul Islam, the person who the Election Commission wanted to appoint was the husband of a Bangladesh Nationalist Party worker. This case highlights how public officials within the Election Commission engage in informal behavior.

### **3.6. Interviews**

The core methodology employed in this dissertation is semi-structured, stakeholder orientated elite interviews with different groups of experts involved in the electoral process in Bangladesh. In line with Tansey's suggestion, the researcher has attempted to draw a sample of interviewees that includes important players that have participated in the events being studied,<sup>15</sup> such as lawyers involved in the cases under discussion, Election Commissioners and senior members of political parties and civil society. The in-

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<sup>14</sup> Writ Petition No. 4674 of 2006 (where only a writ petition no. is provided it is because the case was not reported).

<sup>15</sup> Oisín Tansey, 'Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling', *Political Science and Politics*, 40(2007) 765.

depth interviews were conducted face-to-face in most cases and were structured in such a way that the researcher posed questions to the interviewee, who was treated as the expert. These interviews allowed the researcher to observe how participants in the electoral, political and legal process in Bangladesh interpret the events, phenomenon and rules in their world.<sup>16</sup> One on one interviews were especially appropriate for this research as the discussion related to sensitive issues of patronage, clientelism and politicization which interviewees would not have been comfortable discussing in group settings. Snowballing methodology, which constituted of identifying an initial subject who then named other experts and made introductions, was used in order to gain access to interviewees. These interviews have brought in new knowledge to the field of electoral studies and political patronage in Bangladesh. The researcher interviewed forty expert actors involved in the electoral process in Bangladesh including politicians, election observers, election commissioners and officers, constitutional lawyers, media personnel, civil society members and NGO members to get perspectives from all angles. Semi-structured interviews consisted of different sets of questions for different types of actors, and were specifically modified in order to be able to tap into specific experiences of each individual. The interview data consists of audio recordings, typed transcripts of audio recordings and the researcher's notes where the interviewee did not want a recorder at the interview. Most interviews were conducted in Bengali and the excerpts used in this dissertation have been translated by the author. The list of interviewees and short biographies are provided in the Bibliography. Wherever interviewee statements have been disclosed with reference to the interviewee's identity, it is on the basis of the

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<sup>16</sup> See generally Mack, Woodsong et al, 'Qualitative Research Methods: A Data Collector's Field Guide'.



researcher having received permission to publish in accordance with the University of London Ethical Guidelines.<sup>17</sup>

Broadly speaking, actors were divided into four categories: politicians, lawyers, bureaucrats and civil society activists. The following will introduce the actors and the types of question addressed to them:

### ***3.6.1. Politicians***

The researcher interviewed past and present Members of Parliament from a range of political parties in order to understand how representatives perceive their voters, what they believe voters expect from them, what they believe their party leadership and faction leaders expect from them, and how this in turn affects the behavior of Members of Parliament both during campaigning and in Parliament. Further, these interviews allowed the researcher to understand how politicians perceive each other, institutions of accountability and the opposition. Most importantly, these interviews allowed the researcher to gain an understanding of the hierarchy within political parties and the authority of political party members depending on their position, and what this means for specific processes such as nominations. These interviews also allowed the researcher to explore the extent to which informal institutions take precedence over formal ones for the actors involved. Interviews have been conducted to understand what sort of interaction or requirement maintain patron-client relationships between political actors and the voters, the source of politicians' funding for electoral campaigning, what the money is spent on and how political parties nominate their electoral candidates? These interviews also gave an insight to the researcher on how important politicians feel it is to maintain patronage networks and the way this is done, including how state benefits are distributed and how they conflict with formal rules and make formal electoral laws

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<sup>17</sup> Research Ethics Policy, School of Oriental and Africa Studies, 18 February 2014.

ineffective. These interviews and the question sets have evolved with the research and with developments in the politics of Bangladesh.

### ***3.6.2. Lawyers***

The researcher has interviewed advocates of the Supreme Court of Bangladesh to gather their opinion on the institutional and legal framework for elections in Bangladesh. Due to the lack of literature on electoral laws in Bangladesh, these interviews gave the interviewer a much clearer understanding of the formal rules and the ways they are weakened, particularly because of the interference of politicians who need to maintain informal institutions. These interviews gave the researcher an insight into what sort of decisions the court has been willing to give in relation to electoral disputes and electoral reform. In addition, the researcher had the opportunity to interview a number of lawyers involved in the case laws used in this dissertation. These interviews gave the researcher a lot of insight into the background of the cases, how politicized both the filing and the decisions may have been, and the interactions between formal rules and informal patronage institutions. Again, prior to conducting these interviews the researcher prepared guiding questions, which evolved with the research, the specific knowledge of the interviewee and sometimes during the interview.

### ***3.6.3. Bureaucrats***

The researcher interviewed Public Servants within the Election Commission, including past and present Chief Election Commissioners, Commissioners and local level election officers. The aim was to determine the extent of their freedom from executive interference, to explore the existence of party affiliations, to inquire into the possible repercussions in cases of non-conformity with executive orders, and so on. These interviews helped the researcher understand the constraints under which public officials in Bangladesh work and how they perceive their role as the guardians of elections. This

also gave the researcher an insight into politicization and partisanship within the Election Commission. A set of guiding questions were used that evolved with the research, depending on the position of the interviewee within the Election Commission, i.e. the set of questions for enumerators and lower level officers differed from questions for Commissioners.

#### ***3.6.4. Civil Society (Media, Think Tanks and Academics)***

The author interviewed third sector actors such as members of NGOs, media and academia to gather their opinion on the value of institutional development in Bangladesh and its impact on democratization. These interviews helped the researcher understand where civil society thinks Bangladesh is in terms of fair elections and what they perceive as the main hindrance to peaceful transition of power. These interviews gave the researcher further insight into how formal rules and procedures fare in the face of strong informal networks that follow their own rules, which are often in conflict with the formal. The researcher was able to interview heads of some of the NGOs involved in filing Public Interest Litigation cases that are used as case studies in this dissertation and get insider perspectives of events. These interviews gave the researcher a unique understanding of the political pressures faced by the civil society in Bangladesh and how this has led to politicization of this supposed apolitical sector to some extent.

### **3.7. Research Seminars, Conferences and Publications**

The researcher attended and presented at several conferences, seminars and workshops over the period of the research. The conferences gave the researcher a chance to present chapters of the PhD in front of an expert group. The feedback received from these conferences was invaluable, and led to the publication of three chapters of this PhD, modified into academic articles for peer-reviewed academic journals. Conferences attended include The Cambridge Journal of International and Comparative Law

conference, The Matchpoints Seminar, The European Consortium of Political Research Conference, CPD-ASK-SUJAN-TIB discussion forum, 'Bangladesh in Crisis: Citizens' Concern in Dhaka, the British Council Researcher Links Workshop in Dhaka, the Japanese Association for South Asian Studies Conference at the University of Tokyo, the Inter-Institutional Relations Colloquium at the London School of Economics and the Asian Constitutional Law Forum at the National University of Singapore. The author also presented at the Association for British Turkish Academics (ABTA) Doctoral Researcher Awards 2015 and this PhD was short-listed as a top-five finalist. The publications of versions of Chapter two, five and six appear in the Cambridge Journal of International and Comparative Law, the International Review of Law and the International Journal of Small Economies. Each of the journals sent the articles through a blind double-peer review process and the researcher was able to achieve a higher standard on the basis of the comments and suggestions from reviewers.

### **3.8. Problems and Solutions**

While undertaking the research for this PhD the researcher came across a number of obstacles that had to be overcome. Primarily, the unavailability of data and literature on Bangladesh available online was a constant struggle and much of the research was archival. This meant long hours of digging through the archives and library of the law chamber the researcher was associated with when working in Dhaka. Getting documents from the Parliament Secretariat and the Election Commission was very difficult and also required archival work and snowballing methods. Both the Parliament and the Election Commission were reluctant in handing out information and the researcher had to use her contacts, including interviewees, to request relevant people to allow her access to documents. Most documents the researcher was able to access were in Bengali and had to be translated. However, the researcher overcame these issues through using her

networks in Dhaka (she was a practicing lawyer in Bangladesh) to convince public officials to grant her both interviews and following from that, access to databases and archives.

Another difficulty was the lack of availability of Bangladeshi statutes and case law on the web. While the website of the Election Commission now has all the Election Laws available online,<sup>18</sup> full judgments of many cases pertaining to electoral issues are not easily available. Again, in order to access full judgments and original petitions filed, the researcher had to rely on her contacts in Bangladesh. This was time consuming and sometimes even resulted in no response at all from contacts in Dhaka.

The other issue the researcher encountered was in preparing the literature review on patronage. There is an extreme dearth of literature without the traditional western bias against patron-client networks, especially with regards to Bangladesh. While there is growing literature that recognizes the functional aspect of patron-client networks,<sup>19</sup> very few focus on Bangladesh.<sup>20</sup> Further, in relation to the study of legal processes in Bangladesh, there is no literature that suggests looking at informal institutions. Most formal institutional studies on Bangladesh focus on path-dependence and informal institutions are referred to from a macro perspective without specific evidence of their workings. Thus, from the outset the literature on Bangladesh presented the researcher with a view of formal institutions as the only relevant institution for the study of law and democratization.

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<sup>18</sup> Bangladesh Election Commission, <<http://www.ecs.gov.bd/English/index.php>> (Accessed on 9 September 2015).

<sup>19</sup> Lucy Taylor, 'Client-ship and Citizenship in Latin America', *Bulletin of Latin American Research* 1(2004) 213-227.

<sup>20</sup> Devine does point to social capital, loyalty and identity aspects of patronage in Bangladesh. See, Joseph Devine, 'NGOs, Politics and Grassroots Mobilization: Evidence from Bangladesh', *Journal of South Asian Development* 1 (2006): 77-99.

One of the issues the researcher faced during interviews was that interviewees, especially politicians and public servants, were sometimes reluctant to give their honest opinion, especially when it could implicate more senior members of political parties, government or the public service. The researcher got around this by giving the interviewees the choice to remain anonymous and by sometimes not using a recorder. It was also clarified that the methodology strictly adheres to the research ethical standards set by the University of London. Another difficulty in relation to interviews was the amount of time it took to transcribe interviews most of which were in Bengali. Transcribing while translating took the researcher approximately one full day for one hour of interview time, and most of the interviews were at least two hours long. Thus the researcher had to be very selective about whom to interview and only transcribed and used interviews relevant to the research.

The final, and perhaps most complicated aspect of research in Dhaka was the frequency of hartals and political violence. This meant that the researcher was unable to travel, especially to areas such as Motijheel, where the Ministries and Supreme Court are located and Mohammadpur and Mirpur where the Parliament, Parliamentarians Offices and Election Commission are located. The researcher had to remain in Dhaka for her fieldwork for longer than anticipated because of such delays associated with safety of travel prior to elections held in January 2014.

## Chapter 4 – The Politicization of the Bangladesh Election Commission

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### 4.1. Introduction

In order to hold elections an enormous and complicated administrative task is necessary. Because of the high stakes involved with elections a weakness or failure in conducting the task of election administration can result in democratic breakdown and violence, as has happened in Bangladesh in 1991, 1996, 2006 and 2014 (please see introductory chapter and below for a detailed analysis). In transitional democracies, with weak states and bureaucratic incapacity, the electoral process is rarely smooth and governments have consistently tried to manipulate the electoral process to support the incumbent. This results in opposition parties interpreting all electoral irregularities as political bias and concluding that the only path to change is violence. Electoral management bodies, such as election commissions, play a large role in diffusing the belief amongst opposition parties that the electoral process is biased and the character, composition and competence of an electoral management body can determine ‘whether an election is a source of peaceful change or a cause of serious instability’.<sup>1</sup>

In most developed democracies, it is the executive that is responsible for the conduct of elections, with some areas such as boundary delimitation (e.g. UK Boundary Commission) being handled by independent commissions. Susanna DeBusk found that in 75% of industrialized democracies, it is the government and not independent commissions, who are responsible for conducting elections.<sup>2</sup> This is possible because people have confidence in the independence of the electoral process and electoral management institutions and trust that the conduct of elections will be fair. The effort in

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<sup>1</sup> Robert Pastor, ‘A Brief History of Electoral Commissions’ in *The Self-Restraining State: Power and Accountability in New Democracies*, ed. Andreas Schedler et al, (London: Lynne Rienner, 1999) 75.

<sup>2</sup> Susanna DeBusk, ‘1996 International Directory of Election Offices’, Washington, IFES, 1996.

advanced democracies is mostly focused on constitutional issues and system designs in order to make elections more representative. But in developing countries, electoral issues and conflict do not only arise from design issues, but also from a lack of administrative capacity. The plethora of activities that need to be undertaken before conducting an election range from appointing and training election officials, preparing the electoral role, boundary delimitation to enforcing rules on campaigning, monitoring polling booths to counting results and so on. If a problem arises at any stage of these functions, in transitional democracies such as Bangladesh, most people assume that it is a result of political manipulation. Thus, an independent and separate electoral management body in transitional democracies is essential for democratic consolidation.

It is extremely important for transitional democracies to have in place a methodology or an institution to oversee the electoral process. This institution must be impartial and independent and able to promote confidence amongst all participants, including the opposition parties and voters in order to avoid instability and violence.<sup>3</sup> In order to insulate elections from the executive, after WWII, India and Costa Rica were the first countries to establish elections commissions. Two nations of very different size, population and ethnic composition at different ends of the world established election commissions in order to insulate elections from politics. Since then the majority of transitional countries across the globe, have put in place election commissions to hold elections. The ideal election commission, according to past Bangladesh election commissioner Shakawat Hussain, is:

*institutionally independent and autonomous from the executive branch of government, and manages its own budget. Under this model (the Election Commission) is not accountable to the government or to any ministry or department but may be made accountable to the Parliament,*

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<sup>3</sup> Pastor, 'A Brief History of Electoral Commissions', 75.



*judiciary or to the head of state. It enjoys financial autonomy. It is constituted with members from outside the government control and the government officer placed within the Election Monitoring Body office is under the jurisdiction of the Election Monitoring Body.*<sup>4</sup>

This model is now in place in most emerging democracies including Bangladesh, India, Pakistan, Indonesia, Nepal, South Africa and Thailand. However, the success of election commissions has been extremely varied and dependent on the autonomy of the commission, the independence of election commissioners and the level of separation from the executive.<sup>5</sup> For example, while the Bangladesh Constitution adopted the Indian provision for an Election Commission almost verbatim, the Bangladesh Election Commission has been far less successful than its Indian counterpart.

The framers of the Indian Constitution in 1950 ensured that elections would be beyond the reach of ‘party government’ by authorizing an Election Commission for the ‘superintendence, direction, and control of the electoral rolls for the conduct of all elections to parliament and to the legislature of every state and to the offices of the President and Vice-President’.<sup>6</sup> Article 324 of the Indian Constitution is precise and complete in giving the Election Commission all powers and independence.<sup>7</sup> The constitutional fathers of India wanted a single chief election officer to be in charge of all election matters and wanted to place all such issues outside the reach of party government. The Indian Election Commission chair is selected by the President, but is supposed to be separated from both the executive and the legislature. The Indian Election Commission is known to be more independent, impartial and competent than

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<sup>4</sup> Sakhawat Hussain, ‘Electoral Reform in Bangladesh 1972-2008’ (Dhaka: Palok Publishers, 2012) 72.

<sup>5</sup> Pastor, ‘A Brief History of Electoral Commissions’, 80.

<sup>6</sup> Article 324, The Constitution of India 1949.

<sup>7</sup> A brief overview of the powers of the Indian Election Commission seemed important to the author as the Bangladesh constitutional provisions for an independent Election Commission is derived directly from the Indian provision.

most election commissions in developing countries.<sup>8</sup> The provision for an independent Election Commission has allowed for India to hold 16 successful parliamentary elections despite the emergency in 1975.<sup>9</sup> Furthermore, the Indian Election Commission has a reputation for fairness and effectiveness.<sup>10</sup> The Indian success may be attributed to the continuity of the colonial state and pre-independence experiments with elections under British rule. The design of the Indian Constitution, political parties and people's commitment to the democratic process (even under the dominance of Congress) from 1947 onwards may have allowed for a culture of independence of election commissions. On the other hand, the failure of Pakistan to draft a Constitution for the first few decades of independence and the ruptures in democracy through the use of coups, as described in the introductory chapter (Chapter One), may have left both Pakistan and Bangladesh with a legacy of weak and dependent Election Commissions.

Next door to India, in Bangladesh, the 1972 post independence Constitution adopted the Indian provision for an Election Commission. As discussed in Chapter One, Pakistan had not been able to draft a permanent Constitution prior to the secession of Bangladesh in 1971, and the Pakistan Constitution finally came into force in 1973. Until the secession from Pakistan, East Pakistan had not experimented with elections and was predominantly under military rule. Articles 118 and 119 of the post-independence 1972 Bangladesh Constitution (Constitution), is essentially the same as Article 324 of the Indian Constitution. Article 118 of the Constitution provides for the establishment of an Election Commission comprised of a Chief Election Commissioner and such number of

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<sup>8</sup> Shahabuddin Quraishi, *'An Undocumented Wonder: The Making of the Great Indian Election'*, (New Delhi: Rupa Publications, 2014).

<sup>9</sup> In 1975 the High Court of Allahabad declared Indira Gandhi's election fraudulent and nullified the election. Indira Gandhi declared a state emergency following this judgment. For a detailed study, see, Stanley Kochanek, and Robert Hardgrave, *'India: Government and Politics in a Developing Nation'*, (Belmont: Wadsworth Publishing, 2008).

<sup>10</sup> See generally, Quraishi, *'An Undocumented Wonder: The Making of the Great Indian Election'*.

other Election Commissioners as the President may direct. Until the most recent Election Commission formed in 2012, the President would select the Chief Election Commissioner and other Commissioners for a term of five years. Since 2012 the President chooses a Search Committee who then looks for suitable Commissioners for the President's approval.<sup>11</sup> The Chief Election Commissioner and other Commissioners may be removed only through voluntary resignation or on the grounds of gross misconduct, to be determined after enquiry by a Supreme Judicial Council. To date, no Election Commissioner in Bangladesh has been removed by a Supreme Judicial Council. Nonetheless, there has been a resignation by Justice MA Aziz in 2007, which will be discussed in more detail below. The Bangladesh Election Commission is constitutionally independent in the exercise of its functions. Article 119 of the Constitution stipulates the functions of the Bangladesh Election Commission, which include, among other things, the holding of elections for the members of parliament, superintendence, direction and control of the preparation of the election rolls and delimitation of constituencies for the purpose of parliamentary elections. The Bangladesh Election Commission is assisted by its own staff and a permanent Secretariat to administer the electoral process. Until 2008, the Election Commission Secretariat was attached to the Prime Minister's Office.<sup>12</sup> Since then, the Election Commission Secretariat Act (2009) fully separated the Election Commission Secretariat from the Prime Minister's Office and now has independent status under the auspices of the Chief Election Commissioner. As past Chief Election Commissioner, Shamsul Huda, writes, '[a]s far as structural independence is concerned,

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<sup>11</sup> Shamsul Huda, 'Independence of Bangladesh Election Commission: Its Meaning, Attributes and Limit', *The Daily Star*, 17 March 2013. (The writer is a former Chief Election Commissioner of Bangladesh (2008-2012)).

<sup>12</sup> Peter Eicher, Zaharul Alam, Zaharul and Jeremy Eckstein, 'Elections in Bangladesh 2006-2009: Turning Failure into Success', United Nations Development Program Bangladesh, 2010, 24.

Bangladesh Election Commission is already sufficiently empowered and strengthened'.<sup>13</sup>

However, despite the existence of a provision for an independent Election Commission in Bangladesh, elections held under the supervision of the Election Commission have been 'flawed' in the manner that Pastor defines. While it is very difficult to define what a 'free and fair' election is, traditional definitions of 'flawed' elections are based on 'checklists' (most of which the Bangladesh electoral legal framework would meet).<sup>14</sup> But Pastor's definition calls an election flawed when 'some or all of the major political parties refuse to participate in the election or reject the results'.<sup>15</sup> Opposition parties in Bangladesh have refused to participate in every election held under the auspices of the Election Commission since 1991, unless a Non-Party Caretaker Government was in power. This to some extent indicates that the Bangladesh Election Commission has failed or is perceived as a failure in its task as the guardian of elections.

This chapter will use electoral roll case studies to show that the Bangladesh Election Commission has failed as an independent body because of politicization and patronage within the institution and therefore is not perceived as separated from the executive. The provision for a Non-Party Caretaker Government has been necessitated in Bangladesh because the Election Commission is not trusted. The research on the Election Commission used both primary and secondary sources. Primary sources include interviews with the present Chief Election Commissioner and a past Chief Election Commissioner and past and present Election Commissioners, local level election officers and enumerators, Members of Parliament and leaders of political parties and other key informants including election experts, academics, supreme court lawyers, executives of

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<sup>13</sup> Huda, 'Independence of Bangladesh Election Commission' (The writer is a former Chief Election Commissioner of Bangladesh (2008-2012).

<sup>14</sup> See, International Institute for Democracy and Electoral Assistance, *International Electoral Standards: Guidelines for reviewing the legal framework for elections*, 2002.

<sup>15</sup> Robert Pastor, 'The Role of Electoral Administration in Democratic Transitions: Implications for Policy and Research', *Democratization*, 6 (2007) 15.

national and international election monitoring agencies, executives directors of think tanks and media personnel.<sup>16</sup> Secondary sources have also been relied on for contextualisation. Some of the limitations of the study are lack of access to the Election Commission and politicians, contradictory statements from government and opposition actors, refusal to answer questions, lack of literature on the Election Commission and dearth of documented information on the Election Commission.

This chapter is divided into Four parts. Part Two will examine the legal framework in place for the Bangladesh Election Commission. The researcher will use interviews from the field to demonstrate the general perception of the legal framework and formal institutional weaknesses. Part Three of the chapter will show that despite being given *de jure* powers and independence by the Constitution and judicial review, in practice the Bangladesh Election Commission has failed to be independent. The 2006 voter list crisis will be used as a case study to illustrate the ways in which the Bangladesh Election Commission has lost credibility. Two High Court cases and their background conditions are studied for the purpose of this chapter. The first, *Rahmat Ali v Election Commission*,<sup>17</sup> highlights high-level politicization amongst election commissioners. The second case study looks at lower level politicization by studying the background details of *Aminul Haque Bhuiyan v Election Commission*<sup>18</sup> in which case, officers of the Election Commission attempted to insert 900 false names into the 2006 voter list. Finally, the chapter concludes that the workings of informal institutions in Bangladesh have an affect on formal electoral law implementation.

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<sup>16</sup> Interviews on file with author. Some relevant transcripts of interviews have been made available in the Appendix.

<sup>17</sup> 11 BLC (2006) 380.

<sup>18</sup> Writ Petition No. 4674 of 2006.

## 4.2. Election Commission: Legal Framework and Formal Institutional Weakness

According to Article 119 of the Bangladesh Constitution, the Bangladesh Election Commission is responsible for administering direct elections for the Parliament and all other levels of local government.<sup>19</sup> Parliamentary legislation has also entrusted the Election Commission with the task of conducting indirect elections for the office of the President and for the reserved seats in Parliament.<sup>20</sup> The Election Commission is also responsible for preparing the electoral roll for all elections under its jurisdiction and for the delimitation of constituencies for parliamentary elections.<sup>21</sup> The success of these activities and therefore elections in Bangladesh depends largely on the institutional capacity of the Bangladesh Election Commission.

The Bangladesh electoral legal framework covers most of the areas suggested in IDEA's International Electoral Standards Guidelines in order to have a comprehensive legal framework.<sup>22</sup> The Bangladesh Election Commission is a constitutional body and Article 118 (4) stipulates that the 'Election Commission shall be independent in the exercise of its functions and subject only to this Constitution and any other law'.<sup>23</sup> The Constitution also gives the Election Commission power to take any possible measures and use any necessary means in its duty to hold free and fair elections. The Supreme Court reaffirmed the powers of the Election Commission in *Abdul Momen Chowdhury and Others v Bangladesh and others*,<sup>24</sup> when it stated that:

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<sup>19</sup> Article 119, Bangladesh Constitution.

<sup>20</sup> Presidential Election Act 1991 and National Parliament (Reserved Seat For Women) Act 2004 respectively.

<sup>21</sup> Article 121 and Article 125 respectively, Constitution of Bangladesh.

<sup>22</sup> Huda, 'Independence of Bangladesh Election Commission'. See also, International Institute for Democracy and Electoral Assistance, International Electoral Standards: Guidelines for reviewing the legal framework for elections, 2002.

<sup>23</sup> Article 118 (4), Constitution of Bangladesh.

<sup>24</sup> 2007, 36 CLC (AD) (8693).

*[f]rom a close reading of Article 119 of the Constitution, it appears that the Election Commission has been given a plenary power of superintendence, direction and control of the preparation of the electoral rolls for elections and therefore whatever power is necessary for the purpose must be presumed to be there unless there is an ouster by express provision.<sup>25</sup>*

During the researcher's time in the field she found that most interviewees involved in the electoral process, including local and international election observers, believed that the electoral legal framework of Bangladesh was substantive and perhaps even ideal and that the Constitution intended to create an independent Election Commission with all necessary powers. A Supreme Court lawyer and constitutional expert in an interview with the researcher stated that:

*If you look at the institutional framework, I think the framework is kind of an ideal framework in the sense that it has been created through the Constitution itself. So among three or four constitutional organs that have been created by the Constitution, Election Commission is one of them, others being Judiciary, Parliament and Auditor General office. So theoretically speaking there is enormous potential for having an independent, solid and strong Election Commission. But how we are translating them in practice is an altogether different question.<sup>26</sup>*

Despite the constitutional provision the Election Commission and elections held under its supervision are seriously mistrusted and perceived to be politically influenced by opposition parties, civil society and voters. For example, Akbar Ali Khan, renowned economist, educationist and intellectual in Bangladesh and past advisor to the Caretaker Government writes that '[e]lection commissions in Bangladesh could not hold a single credible election without the support of a non-party government'.<sup>27</sup> Prior to each election

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<sup>25</sup> Abdul Momen Chowdhury and Others v Bangladesh and Others, 2007, 36 CLC (AD) (8693).

<sup>26</sup> Interview A14.

<sup>27</sup> Akbar Ali Khan, 'The Choice Between the Unpalatable and Disastrous', *The Daily Star*, 17 March 2013.

since 1991 (the so called ‘democratic era’), there has been serious political violence and conflict because of accusations of partisanship by Election Commissions. As a result of this mistrust, since 1996, until the 15<sup>th</sup> amendment in 2011, elections in Bangladesh were held under a non-political Caretaker Government. The primary reason behind the creation of the Caretaker Government was the ‘absence of trust among political parties, and the absence of strong institutions that can be trusted to hold an acceptable election’<sup>28</sup> (the non-political Caretaker Government is discussed in detail in the next chapter of this thesis). Further, a Transparency International Bangladesh report also points to the problem that:

*‘despite a good number of laws and rules, the Election Commission still lacks legal provisions in respect of an enabling law for its establishment and structure like other constitutional bodies, an independent Secretariat on its own, hiring and firing authority, financial independence, monitoring authority over political parties and proper mechanism of processing election disputes. Inconsistencies among some of the electoral laws and rules are also observed’*<sup>29</sup>

Some of the formal institutional weaknesses that contribute to the ineffectiveness of the Election Commission include:

#### ***4.2.1. Appointment of the Chief Election Commissioner and other Commissioners***

In a paper written for the American Politics Workshop, Burden et al argue that the method of selecting public officials has a huge impact on their environment, the types of

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<sup>28</sup> Ali Riaz, ‘Bangladesh in Turmoil: A Nation on the Brink’, Testimony before the Sub-Committee on Asia and the Pacific Committee on Foreign Affairs, United States House of Representatives, 20 November 2013.

<sup>29</sup> Shazada Akram and Shadhan Das,, ‘Bangladesh Election Commission: A Diagnostic Study’, Transparency International Bangladesh, Dhaka (Date Unknown).



pressures they face and most importantly, the policy goals they pursue.<sup>30</sup> Burden et al use election administration as a case study and find that election officers who are elected rather than appointed are more likely to ‘express attitudes and generate outcomes that reflects their direct exposure to the policy preferences of voters.’<sup>31</sup> On the other hand, appointed officials tend to be biased and often pursue their own partisanship when it differs from the preferences of the electorate. Thus, who is running an election and how they have been appointed to do so can have a huge impact on the nature and outcome of elections. The appointment process of Election Commissioners is therefore probably the most important aspect of the independence and success of the Bangladesh Election Commission.

While the Bangladesh Constitution envisions an independent Election Commission, it leaves the appointment of Election Commissioners up to the President.<sup>32</sup> When the Election Commission consists of more than one person, the Chief Election Commissioner acts as the chairman of the Election Commission. Commissioners are appointed for a term of five years and can only be removed on the grounds and in the same manner as Supreme Court judges.<sup>33</sup> In order to maintain the independence and neutrality of Commissioners, the Constitution makes the Chief Election Commissioner ineligible for appointment in the service of the Republic.<sup>34</sup> The other Commissioners can be appointed as Chief Election Commissioner but become ineligible to hold any other position in the service of the Republic.<sup>35</sup> However, neither the Constitution nor any of

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<sup>30</sup> Barry Burden, David Canon, Stephane Levartu et al, ‘Comparing Elected and Appointed Election Officials: The Impact of Selection Method on Policy Preferences and Administrative Outcomes’, (Paper prepared for the American Politics Workshop, Department of Political Science, University of Wisconsin- Madison, 2010).

<sup>31</sup> Barry, Canon, Levartu et al, ‘Comparing Elected and Appointed Election Officials: The Impact of Selection Method on Policy Preferences and Administrative Outcomes’.

<sup>32</sup> Article 118, Constitution of Bangladesh.

<sup>33</sup> Article 118, Constitution of Bangladesh.

<sup>34</sup> Article 118, Constitution of Bangladesh.

<sup>35</sup> Article 118, Constitution of Bangladesh.

the electoral laws and rules prescribes any required qualifications for the appointment to the post of Chief Election Commissioner or Election Commissioner. This has contributed to making the Election Commission controversial as discussed below.

While the Constitution gives the power of appointment of commissioners to the President, Article 48(3) also states that the President is required to act on the advice of the Prime Minister in ‘the exercise of all functions assigned to him by the Constitution or any law’<sup>36</sup> except in appointing the Prime Minister and the Chief Justice.<sup>37</sup> Most appointments of Election Commissioners to date ‘ha[ve] been questioned by the public’<sup>38</sup> and it is generally believed that the Prime Minister and the party in power makes the actual selection, thereby politicizing appointments of the Commissioners. During the researcher’s time in the field, the flawed appointment process of Commissioners and the selection of partisan Commissioners by successive governments was a common assertion against the legal framework of the Election Commission. The following extracts from interviews with a Past Election Commissioner and a Supreme Court Lawyer highlight this issue. The Supreme Court lawyer asserted that:

*On paper we have got an independent Election Commission. But the people who are running the Election Commission we have consistently and deliberately appointed the people who do not have that mindset and are partisan. Actually the Commissioners themselves are not appreciating the strength and the power that has been vested upon them. Because while we are making a choice whom we are appointing as the Election Commission, it is up to the... President appoints him but because of our current constitutional framework President is bound by the advice of the Prime Minister. The way the process of appointment of Election Commission actually works, is*

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<sup>36</sup>Article 48(3), Constitution of Bangladesh. For a discussion see, Mahmudul Islam, ‘*Constitutional Law of Bangladesh*’, (Dhaka, Mullick Brothers, 2012) 403.

<sup>37</sup> Article 95 provides that the Chief Justice will be appointed by the President but is silent as to who the President should consult in making the decision.

<sup>38</sup> Hussain, ‘Electoral Reform in Bangladesh 1972-2008’, 46.

*that it is being appointed by the President but President is bound by the advise given by the Prime Minister, so if Prime Minister is sending some recommendation which advise you please go ahead and appoint XYZ as the Election Commissioner, then President is bound to appoint them. So although President is the appointing authority but virtually President has no power to make his own choice because he is always bound by the choice made by the Prime Minister.*<sup>39</sup>

The past Election Commissioner similarly claims that:

*For making a good Election Commission the most important thing you need to do is to find out the appropriate people to be Commissioners... But here as far as the appointment to the Election Commission is concerned, in fact as far as appointment to head any constitutional body is concerned, it is up to one person, the Prime Minister.*<sup>40</sup>

The perception that the Commissioners of the Bangladesh Election Commission have been selected with the hope that they will support the incumbent and act partisan in the disposal of their duties, has been fuelled by both the background and past association of Commissioners along with partisan decisions during their tenure as Commissioners. For example, when interviewing a past Election Commissioner, the author was told:

*Sometimes the perception of partisanship comes from the process of association. I have not personally verified and I did not publicly criticize my successor as a matter of policy. [...] I can tell you that I have heard that out of the five commissioners now, four of them were either Awami League cadre or members of the Awami League front organization Chatra League. One of the fellows he was president of Chittagong Commerce College Chatra League. Another one of the fellows was a political agent of Mr. Mohiuddin Chowdhury when he was contesting the mayoral election in 2010. So this kind of people has been brought in and it is common*

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<sup>39</sup> Interview A14.

<sup>40</sup> Interview A11.

*knowledge that these are party men. And this creates a huge problem because the Election Commission has to be independent.*<sup>41</sup>

Other than past association, the qualifications of Commissioners have also frequently given rise to discontent and allegations of partisanship. The Chief Election Commissioner of Bangladesh holds the status above a state minister and commissioners hold the status of state ministers. The Chief Election Commissioner has the salary, power and function of an Appellate Division judge while the other commissioners hold the status of High Court judges. However, the current Election Commission (since 2012) constitutes of junior joint secretaries, who are lower in the hierarchy of civil servants than state ministers and High Court judges. According to a past Commissioner:

*Never before in the history of Bangladesh were people of this status brought in. They were minimum secretaries or High Court judge. So you bring in this kind of people there will be a suspicion that these people were brought despite not being worthy of this post. Because of this they will be faithful to the government because they will feel gratitude that you gave me a post that I did not deserve.*<sup>42</sup>

Another factor that contributes to negative perceptions of the Election Commission come from partisan action by the Election Commission when there has been a violation of the electoral rules and codes of conduct. The voter list case studies below (Section 4.3.1.1. and 4.3.1.2.) will illustrate how the Election Commission has taken partisan action and failed to apply the law equally. According to Elklit and Svensson, the ‘fairness’ of an election actually means ‘impartiality’.<sup>43</sup> They argue that ‘[t]he opposite of fairness is unequal treatment of equals, whereby some people (or groups) are given unreasonable

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<sup>41</sup> Interview A11.

<sup>42</sup> Interview A11.

<sup>43</sup> Jorgen Elklit and Palle Svensson, ‘What Makes Elections Fair?’, *Journal of Democracy*, 8 (1997) 35.

advantages.<sup>44</sup> The fact that the Commissioners of the Bangladesh Election Commission are perceived as partisan and therefore impartial, highlights that formal institutions, regardless of their place within the constitutional framework, will continue to lack in the ability to contribute to peaceful elections and turnovers in power, as long as informal processes in the form of patronage appointments continue to seep in and conflict with the *raison d'être* of the formal institution.

#### ***4.2.2. Freedom from Executive Interference and the Independence of the Election Commission Secretariat***

According to Article 126 of the Constitution and Article 5 of the Representation of the Peoples Order (1972), it is the responsibility of the executive branch of the government to provide all assistance required by the Election Commission in discharging its duties. The Election Commission is dependent on the government for support in preparing the electoral roll, preserving law and order during elections and in conducting the elections. However, the Election Commission has no redress if the government does not comply with its directions. This is a serious weakness in the legal framework of the Election Commission and affects its capacity to function independently and efficiently. There should be a clear avenue for redress for the Election Commission, should the government refuse or fail to comply with or distort its directives. For example, the Election Commission constitutes of the Election Commission, the Election Commission Secretariat and the field offices.<sup>45</sup> The functions of the Secretariat include providing all assistance to execute the decisions and orders of the Election Commission<sup>46</sup> and it is at

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<sup>44</sup> Elklit and Svensson, 'What Makes Elections Fair?', 35.

<sup>45</sup> Field offices are the regional offices of the Election Commission.

<sup>46</sup> These include the preparation of electoral rolls, delimitation of constituencies, the conduct of referendums and elections to the office of President, Parliament and all local elections, assistance in reserving and allocating party and candidate symbols, supervision of polling arrangements and the appointment of polling officers, assistance with printing and supply of ballot papers, procurement of election materials, the procurement, supply and maintenance of ballot boxes, setting up of result counting and dissemination machines, consolidation of elections results and formal publication in the official gazette, the constitution of tribunals for the disposal of election

the heart of all the latter's function. Thus, its independence is vital for an independent Election Commission.

Although the 1972 Constitution had made a provision for an Election Commission Secretariat under the Election Commission, on 27 May 1982, during Ershad's martial law regime, a President's Order dissolved the Election Commission Secretariat and brought its functions under the President's Secretariat.<sup>47</sup> Upon Bangladesh's return to a parliamentary system of democracy in 1991, the functions that an election commission secretariat undertakes went from being under the President's Secretariat to the Prime Minister's Office. It was only during the tenure of the Non-Party Caretaker Government between 2007 and 2008, under emergency rule that the Election Commission Secretariat created as a separate body through Ordinance No. 5 (2008). After the end of the emergency in 2008, the Parliament converted the Ordinance in to law and the Election Commission Secretariat Act 2009 was passed.

However, the new law did not create a more independent Election Commission and legal reforms have had little impact because of patronage and partisanship in the appointment process of commissioners. During an interview with a past Chief Election Commissioner the researcher was told that:

*The separation of the Election Commission Secretariat became meaningless because the members of the Election Commission would like to do the bidding of the government. The civil society wanted separation of the Election Commission Secretariat on the assumption that the Election Commission wants to do independent work. So the crucial factor is what the commissioners*

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petitions, the collection and compilation of election data, preparing and publishing reports on elections and the regulation and control of officers and staff of the Election Commission and those in the field. From the Bangladesh Election Commission Website, <[http://www.ecs.gov.bd/English/MenuTemplate1.php?Parameter\\_MenuID=9&ByDate=0&Year=](http://www.ecs.gov.bd/English/MenuTemplate1.php?Parameter_MenuID=9&ByDate=0&Year=)> (Accessed on 9 September 2015).

<sup>47</sup> Gyasuddin Molla, 'Democratic Institution Building Process in Bangladesh: 'Model Building'- A Failure?, 'Capacity Development'- A Sine Qua Non?', Department of Political Science, Dhaka University (Unpublished).

*want to do. So, if the Election Commission does not want to act independently, it is irrelevant whether the Secretariat is separated or not.*<sup>48</sup>

#### ***4.2.3. Government Dependency for Budgetary Allocation***

Another formal, institutional reason behind the weakness of the Election Commission is its lack of independence in relation to its own budget. According to Article 88 of the Constitution, salaries and administrative expenses of the Bangladesh Election Commission are charged on the consolidated fund.<sup>49</sup> However, the Ministry of Finance (MoF) has the authority to circumscribe the charged administrative expenses of the Election Commission in the name of financial discipline, thereby making the Election Commission dependent. Further, the Election Commission remains dependent on the MoF for its budgetary allocations for capital and development expenditures, which are not charged to the consolidated fund. For elections of all tiers (local and national) the Election Commission estimates the required expenses and creates a yearly budget for submission to the MoF. However, the Ministry is not required to meet the Election Commissions' estimation. Thus, there is usually a difference between the budget requested by the Election Commission and that actually provided by the MoF. For example, a 2008 Transparency International Study found that the yearly allocation for the Election Commission was Taka 28.82 crore<sup>50</sup> whereas the estimated cost of holding the December 2008 election was Taka 100 crore. However, during an interview with a senior election official of the Election Commission of Bangladesh, the researcher was told that international donors such as the UNDP meet a large portion of the difference in budget allocation and Election Commission requirement.<sup>51</sup> There are also frequent delays in

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<sup>48</sup> Interview with Shamsul Huda.

<sup>49</sup> Article 84 of the Constitution of Bangladesh provides for a Consolidated Fund, which will consist of all revenues received by the Government, all loans raised by the Government and all money received by the Government as repayment of loan.

<sup>50</sup> One crore is equivalent to ten million.

<sup>51</sup> Interview O.

fund disbursement to the Election Commission, which hampers the work of this important institution. The Election Commission has no recourse to justify its budget proposal to the Parliament, should the MoF decide to reject or reduce the proposal.<sup>52</sup> A report by BRAC suggests that:

*Development budgets of constitutional bodies should not be included in the Annual Development Plan (ADP) and can be shown separately in the annual financial statement. Once approved by the Parliament, the development (non-recurrent) activities of constitutional bodies should be exempted from approvals of the Executive Committee of the National Economic Council and Planning Commission.*<sup>53</sup>

#### ***4.2.4. Recruitment of Election Commission Staff and Officers***

The procedure of recruitment of officers and staff at different offices of the Election Commission Secretariat are provided for in the Election Commission (Officers and Staff) Rules (1979). Although the Election Commission has its own officers and staff both on the field and at the Election Commission Secretariat, the recruitment of Class 1<sup>54</sup> officers at the Election Commission field offices is the responsibility of the Ministry of Establishment (MoE). The selection is made by the Public Service Commission and therefore gives rise to several problems, which affect the efficiency of the Election Commission. Firstly, although Election Commission officers are recruited through the Public Service Commission, they are not regarded as service cadres like other administrative cadres, which makes service under the Election Commission unattractive compared to other branches of government administration. Past Commissioner, Shakawat Hossain writes that, '[t]his is one of the drawbacks that the Election

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<sup>52</sup> Shazada Akram and Shadhan Das, 'Bangladesh Election Commission: A Diagnostic Study'.

<sup>53</sup> 'Bangladesh Election Commission: Policy Note', Institute of Governance Studies, BRAC University, May 2008, Dhaka.

<sup>54</sup> Class 1 refers to Officers or Professional Class. For a detailed study of the civil service in Bangladesh, see, Pan Suk Kim and Mobasser Monem, 'Civil Service Reform in Bangladesh: All Play but hardly any Work', United Nations Public Administration Network (Date Unknown).



Commission suffers from in getting more energetic and competent young people'.<sup>55</sup>

Service cadres in Bangladesh usually belong to a ministry while non-cadre posts are usually funded from development money and do not have the same benefits as service cadre posts such as promotion opportunities, pension and security of employment.<sup>56</sup>

The other issue with the Election Commission's recruitment policy arises from the reserved quotas. In promoting staff who are below the Class 1 rank to the rank of District and Upazila level staff,<sup>57</sup> the Election Commission has to reserve 33% of the promotions for different minorities. The Public Service Commission in Bangladesh generally suffers from this as 'altogether 56% of government jobs are reserved under different quotas, leaving only 44% open for merit-based recruitment.'<sup>58</sup> This results in the promoted staff of the Election Commission, a large section of whom are promoted through reserved quotas, to not always be capable of dealing efficiently with their jobs.<sup>59</sup>

Further, the Public Service Commission itself suffers from allegations of favouritism, nepotism and political consideration in its process of recruitment. Many appointments are said to be politicized resulting in a partisan Public Service Commission and therefore a partisan Election Commission.<sup>60</sup>

#### ***4.2.5. Returning Officers***

According to Article 7(1) of the Representation of the Peoples Order (1972), the Election Commission 'shall appoint a Returning Officer for each constituency for the

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<sup>55</sup> Hussain, 'Electoral Reform in Bangladesh 1972-2008', 78.

<sup>56</sup> Ferdous Jahan, 'Public Administration in Bangladesh', State of Governance Studies 2006, Institute of Governance, BRAC University, Dhaka.

<sup>57</sup> Upazila is a sub-district.

<sup>58</sup> Shahidul Islam, 'No Reforms on Quotas', *BD News 24*, 22 June 2013.

<sup>59</sup> Hussain, 'Electoral Reform in Bangladesh 1972-2008', 78.

<sup>60</sup> For a detailed study, please see, Mukherjee, Gokcekus, Manning and Landell-Mills, 'Bangladesh: The Experience and Perceptions of Public Officials'.

purpose of election of a member for that constituency'.<sup>61</sup> The duties of the Returning Officer are one of the most important in the conduct of elections. This is because vital acts necessary for the conduct of elections, from setting up polling stations to appointing presiding officers to giving notice of nomination papers, are all duties of the Returning Officer. According to Article 7(4) and 7(5) of the Representation of the Peoples Order (1972), Returning Officers are required to 'do all such acts and things as may be necessary for effectively conducting an election in accordance with the provisions of this Order and the rules'<sup>62</sup> and 'the Returning Officer shall supervise all work in the district in connection with the conduct of elections and shall also perform such other duties and functions as may be entrusted to him by the Commission'.<sup>63</sup> Thus, the Returning Officer plays a key role in conducting elections. Deputy Commissioners and Upazila Nirbahi Officers<sup>64</sup> are usually chosen as Returning Officers. Unfortunately, as both Deputy Commissioners and Upazila Nirbahi Officers are government officials recruited by the Public Service Commission rather than the Election Commission, the Government can influence election results by placing partisan civil servants in these posts. The case study of the 900 false voter names discussed below will highlight how partisan election officers discredit the entire electoral process.

The brief discussion above highlights that the Bangladesh Election Commission suffers from formal institutional weaknesses. A study of the formal legal framework and institutional capacity of the Election Commission point to a number of difficulties, which contribute to the inability of the Bangladesh Election Commission to hold free, fair and participatory elections. However, it is also evident that many of the formal weaknesses are worsened because of informal elements such as patronage in

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<sup>61</sup> Article 7(1), Representation of the People's Order, 1972.

<sup>62</sup> Article 7(4), Representation of the People's Order 1972.

<sup>63</sup> Article 7(5), Representation of the People's Order 1972.

<sup>64</sup> In Bangladesh the Upazila Nirbahi Officers (UNO) is the chief executive of an Upazila (sub-district).

appointment processes. This research highlights that formal institutional weaknesses are only the tip of the iceberg of the maladies of the Bangladesh Election Commission. Most local stakeholders involved in the electoral process believe that changes in the formal legal regime will not bring about the desired changes within the Election Commission. For example, during interviews with experts in different fields, the researcher was consistently informed that in their opinion the electoral framework in Bangladesh sufficiently covers the areas necessary for the conduct of elections. However, the lack of trust in the Election Commission stems from the issue of informal practices such as corruption, electoral malpractice, patronage appointments, politicization, and partisanship. (See Table 3).

**Table 3: Stakeholders Perception on the Formal Electoral Legal Framework**

Interviewee	Excerpt from Interview
Interview I (Independent Member of Parliament)	<i>On paper the Election Commissioners have been given a lot of power. But they either do not practice it or are not allowed to practice it. It's very difficult to prevent the politicization of the bureaucracy. Now we have fallen into the black hole. Unless there is a huge, dramatic change, society in general has gone corrupt and nobody is remorseful. There is no shame.'</i>
Interview A (Scholar and Author)	<i>'Electoral legal framework provided as much as can be done by any legal system/framework. But no legal framework can deliver results if it is not supported/ nourished by the substantive values/ideals held and practiced by the politicians, voters and public in general.'</i>
Interview A4 (Supreme Court Lawyer)	<i>It is not that the Election Commissioners aren't strong, but they weren't allowed to function by party government's. They were all successful under the Caretaker Government</i>
Interview A3 (Senior member of the National Democratic Institute, Bangladesh Chapter)	<i>'The independence of the Election Commission really depends on how much the Election Commissioners can resist pressure from the two political parties rather than enactment of more legal reform'</i>
Interview A11 (Former Chief Election Commissioner )	<i>'For making a good Election Commission the most important thing you need to do is to find out the appropriate people to be Commissioners..... But here (Bangladesh) as far as the appointment to the</i>

	<i>Election Commission is concerned, in fact as far as appointment to head any constitutional body is concerned, it is up to one person, the Prime Minister regardless of any laws. It's the totality of the situation.</i>
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Notes: 1. These excerpts are samples from interviews. More detailed transcripts of some of the interviews as provided in the Appendix; 2. All translations are the author's own.

As highlighted in Table 3, the major accusations for the flawed nature of elections in Bangladesh by local experts and stakeholders are not because of technical and legal weaknesses in the electoral framework but rather accusations have been directed at other informal institutions that trump the expected workings of formal institutions. The comments by elite actors who observe or are involved in the electoral process in Bangladesh (Table 3), makes it clear that participants in the electoral process in Bangladesh have become frustrated with formal institutions and reform. All participants in the interviews conducted for this research, regardless of political affiliation or position, were of the opinion that further formal rule reform will make little difference in strengthening electoral institutions. Rather, for most stakeholders the formal institutional weaknesses arise from informal patterns of behavior and rules that personalize and make formal institutions partisan. Many interviewees have referred to this as 'mind-set', and said that unless the 'mind-set' of politicians and bureaucrats change, there will be no real separation or strengthening of formal institutions. It is this author's contention that the 'mind-set' referred to here is clientelistic and has observable patterns of informal exchange of the patron-client kind and leads to the personalization of politics. This 'mind-set' gives personal benefits and the maintenance of patronage networks priority over public interest for bureaucrats and politicians.

The following section will analyse writ petitions filed with the High Court in relation to the 2006 electoral roll. The electoral roll controversy faced by the Bangladesh Election Commission in 2005 and 2006 highlights how informal institutions that contradict the

purpose of the Election Commission as a watchdog body induce the failure of the Election Commission to hold free, fair and accepted elections. The 2006 voter list crisis resulted in several writ petitions filed against the Election Commission with the Supreme Court and eventually led to opposition boycott of the election, reconstitution of the Election Commission, reconstitution of the Caretaker Government, postponement of the election and two years of emergency rule. A study of the voter list crisis gives an overview of the politicization of the Election Commission. The case analysed in the final section of this chapter describes the Election Commission's threat to an Assistant Registration Officer to include 900 false names in the voter list and illustrates how politicization and electoral malpractice works in practice by using a very specific example.

#### **4.3. Case Study: Institutional Failure and Controversy over the Electoral Roll**

*It is for the Commission to decide whether the Electoral Roll should be prepared or corrected and amended or revised but it appears that the Commission is sharing the opinion of the political parties as to what to do.*

*Justice Abdul Matin<sup>65</sup>*

One of the most important prerequisites for a free and fair election is an accurate, updated and non-controversial electoral roll. If the electoral roll is under suspicion by voters, candidates and major political parties, then the credibility of the entire election becomes questionable. This can result in Pastor's 'flawed election', whereby opposition parties refuse to participate.<sup>66</sup> An Election Commission that prepares a controversial electoral roll, itself becomes controversial and loses credibility. Past Chief Election

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<sup>65</sup> Rahmat Ali v Bangladesh Election Commission, 11 BLC (2006) 380.

<sup>66</sup> Pastor, 'The Role of Electoral Administration in Democratic Transitions', 15.

Commissioner Shamsul Huda highlights the importance of the electoral roll when he writes:

*Electoral rolls are at the centre of the election management system. The rolls are expected to be prepared strictly on the basis of eligibility criteria set under the law of the land and, after finalization, become the sole determinants for recognition of voters. The importance of electoral rolls is highlighted by the fact that the Constitution of the Republic of Bangladesh specifically mentions the preparation, maintenance and periodic updating of electoral rolls as one of the four mandated responsibilities of the Election Commission.*<sup>67</sup>

Article 119 (d) of the Bangladesh Constitution specifies that the task of preparing the electoral roll falls solely on the Election Commission and the Election Commission is responsible for the preparation and maintenance of the electoral roll for the purpose of all national and local elections.<sup>68</sup> It states that the Election Commission will ‘prepare electoral rolls for the purpose of elections to the office of the President and to Parliament.’<sup>69</sup> There are some limitations in the preparation of the electoral roll specified in Article 121, which states: ‘there shall be one electoral roll for each constituency for the purpose of elections to Parliament, and no special roll shall be prepared so as to classify electors according to religion, race, caste or sex.’<sup>70</sup> Further, as per the Constitution, eighteen is the qualifying age for voters in Bangladesh; all voters must be citizens of Bangladesh; they have to be resident of the constituency they are registering in; they must not be declared by a competent court to be of unsound mind; and she/he should not have been convicted of any offence under the Bangladesh Collaborators (Special

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<sup>67</sup> Huda, ATM Shamsul, ‘Challenges in Management of Electoral Rolls’, Prepared for aceproject.org, <[http://eci.nic.in/eci\\_main/dj/Bangladesh.pdf](http://eci.nic.in/eci_main/dj/Bangladesh.pdf)> (Accessed on 2 September 2015).

<sup>68</sup> Article 119(d), Constitution of Bangladesh.

<sup>69</sup> Article 119, Constitution of Bangladesh.

<sup>70</sup> Article 121, Constitution of Bangladesh.

Tribunals) Order (1972).<sup>71</sup> The Constitution does not specify the methodology to be used in preparing the voter list, but different laws under the Constitution are enacted in order to define the methodology and the process of updating the list. The electoral roll for national and local elections in Bangladesh are managed by the Electoral Rolls Ordinance (1982), the Electoral Rolls Act (2009) and the Voter Registration Rules (2012). There are no official English versions of the 2009 Act and the 2012 Rules and all translations and interpretations are the researcher's own.

The Electoral Rolls Ordinance (1982) provides for the methodology of preparation of the electoral roll.<sup>72</sup> It allows the Election Commission to seek all necessary assistance in the preparation of the electoral roll.<sup>73</sup> It provides a framework for the appointment of registration officers<sup>74</sup> and for the preparation and publication of the electoral rolls.<sup>75</sup> It also applies restrictions on enrollment,<sup>76</sup> states provisions for amendment, correction and revision of the electoral rolls,<sup>77</sup> and sets out the punishment for making false declarations and breach of duty in connection with the preparation of the electoral roll.<sup>78</sup> The punishment for making false declarations is up to one-year imprisonment and/or a fine of five thousand taka.<sup>79</sup> The punishment for breach of duty in relation to the preparation of the electoral roll is up to six months imprisonment and/or two thousand taka.<sup>80</sup>

Up until 2008, there were three methods used for voter registration, namely fresh enumeration, update and review. There is very little literature available on this process

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<sup>71</sup> Article 121, Constitution of Bangladesh. These are tribunals set up to try those accused of having joined the Pakistan army and committed war crimes against Bangladeshis during the 1971 independence war.

<sup>72</sup> S.5, Electoral Rolls Ordinance 1982.

<sup>73</sup> S.4, Electoral Rolls Ordinance 1982.

<sup>74</sup> S.6, Electoral Rolls Ordinance 1982.

<sup>75</sup> S.7, Electoral Rolls Ordinance 1982.

<sup>76</sup> S.9, Electoral Rolls Ordinance 1982.

<sup>77</sup> S.10 and S.11, Electoral Rolls Ordinance 1982.

<sup>78</sup> S.18 and S.19, Electoral Rolls Ordinance 1982.

<sup>79</sup> S. 19, Bhotar Talika Ain, 2009.

<sup>80</sup> S. 20, Bhotar Talika Ain, 2009.

and the researcher has had to rely on interviews with Election Commissioners and enumerators in order to identify the details. During an interview with a former Chief Election Commissioner,<sup>81</sup> the researcher was informed that a fresh enumeration created a new electoral roll by sending enumerators to every household and listing all eligible voters. The second method was an update, whereby the existing electoral roll was updated by sending enumerators to every household. Enumerators checked the existing roll against the eligible voters in each household and inserted changes, additions and deleted from the list accordingly. Finally, the review method was concerned with a fresh enumeration within a specified electoral area.<sup>82</sup>

Until 2007, the accepted norm for the preparation of the electoral roll in Bangladesh was the fresh enumeration method. Although this method exists in many countries, there have always been accusations in Bangladesh of partisan enumerators. Each voter had to fill out a single-page form, which included a tear-off coupon for the voter.<sup>83</sup> These forms were taken door to door by enumerators and filled in by voters. Except listing a name and an address, there was no other way of visually identifying the voter, and therefore no way of ensuring that the genuine voter was attending the polling booth (many Bangladeshis do not have passports and until 2008 there were no National ID cards<sup>84</sup>). There was also no way of ensuring that the voter was of voting age or that they were not registering in multiple constituencies. The only updates would take place prior to the next general election, and there was no way of accounting properly for the number of voters who had died. Though a period of public scrutiny for exclusion or inclusion in the

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<sup>81</sup> Interview A11.

<sup>82</sup> Interview A11.

<sup>83</sup> Bangladesh Voter Registration Form, National Identity Registration Wing <<http://www.nidw.gov.bd/>> (Accessed on 3 September 2015).

<sup>84</sup> During the tenure of the Caretaker Government between 2007-2008 all voters were provided with a National Identity Card. On 27 March 2007 the High Court gave a judgment ordering the Election Commission to provide voter ID cards in *Kazi Mamnur Rashid v Bangladesh* 16 BLT(HCD) 2008.



electoral roll was set aside by the Election Commission, most observers agree that this was insufficient and did not mitigate the flaws.<sup>85</sup> According to past Election Commissioner Sakhawat Hossain, ‘The system gave ample opportunity for inclusion of spurious, underage and duplicate or triplicate voters.’<sup>86</sup>

Under the old method of preparing the electoral roll, revision was a cumbersome process and manipulation of the roll was easy and common practice. Moreover, the past electoral rolls had a huge margin of error. While traditional margins of error are about 5%, in Bangladesh this has been as great as 13%.<sup>87</sup> Inaccessibility, manipulation and partisan registration often made the enrolment process a major challenge for the Election Commission and a major reason for it to be viewed as politicized. In the following section the voter list of 2006 and events surrounding the Supreme Court declaring it void is analysed. The 2006 voter list generated huge criticism of the Election Commission and its Commissioners. It eventually ended with the boycott of the 2007 election by the opposition parties (the election was cancelled in January 2007 and postponed for two years), resignation of the Chief Election Commissioner MA Aziz, a declaration of emergency for two years under a non-political Caretaker Government and a new electoral roll.<sup>88</sup>

#### ***4.3.1. The Voter List Crisis of 2006***

On 21 July 2005 the Election Commission decided to prepare a fresh voter list for the 9<sup>th</sup> Parliamentary elections, which were scheduled for January 2007. This decision was arrived at after consulting with political parties.<sup>89</sup> However, the consultation process was one sided as the main opposition, the Awami League and its allies, refused to participate

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<sup>85</sup> Huda, ‘Challenges in Management of Electoral Rolls’.

<sup>86</sup> Hussain, ‘Electoral Reform in Bangladesh 1972-2008’, 54.

<sup>87</sup> Huda, ‘Challenges in Management of Electoral Rolls’.

<sup>88</sup> Kumaraswamy, P.R., Datta, Sreeradha, ‘Democracy in Bangladesh: From Fragility to Collapse?’, *Strategic Insights*, 6 (2007).

<sup>89</sup> Hussain, ‘Electoral Reform in Bangladesh 1972-2008’, 64.

in the consultation in order to protest the appointment of the Chief Election Commissioner, and did not attend the meetings.<sup>90</sup> MA Aziz, the then Chief Election Commissioner, was a serving Supreme Court Appellate Division judge when he was appointed Chief Election Commissioner. This was unprecedented as previously only retired High Court judges and Secretaries had been appointed as Chief Election Commissioners (see discussion on appointment process in Section 2.1). The Awami League, then in opposition, claimed that MA Aziz was selected by the President with an ulterior motive to create a partisan Election Commission and politicize the institution.<sup>91</sup> Aziz's actions as the Chief Election Commissioner confirmed for many that the opposition claims were valid (details of the role of MA Aziz in the voter list crisis are given below) and his appointment was later challenged in court.<sup>92</sup> The decision in *Ruhul Quddus v Justice M.A. Aziz*<sup>93</sup> declared judges' appointment to the Bangladesh Election Commission unconstitutional. It was reasoned that the possibility of post-retirement appointment in constitutional and quasi-judicial posts suppresses judges' activism and encourages them to be statist.<sup>94</sup>

In August 2005, over a year before the scheduled 9<sup>th</sup> parliamentary elections, MA Aziz ordered a door-to-door enumeration in order to prepare a fresh electoral roll. The opposition alleged that the enumerators hired by the Election Commission were mostly partisan and that the list contained millions of false voters.<sup>95</sup> Looking at census data, the opposition alleged that as many as 14 million excess names were on the new voter list.<sup>96</sup> The voter list contained 91 million names, a number that seemed inflated in a country of

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<sup>90</sup> Hussain, 'Electoral Reform in Bangladesh 1972-2008', 64.

<sup>91</sup> 'Iajuddin not making Interim Government Effective', *The Daily Star*, 8 November 2006.

<sup>92</sup> Advocate Ruhul Quddus v Justice M.A Aziz, (2008) 60 DLR (HCD) 511.

<sup>93</sup> Advocate Ruhul Quddus v Justice M.A Aziz, (2008) 60 DLR (HCD) 511.

<sup>94</sup> Hoque, Ridwanul, *Judicial Activism in Bangladesh: A Golden Mean Approach*, (Cambridge: Cambridge Scholars Publishing, 2011) 211.

<sup>95</sup> 'Police Intercept Election Commission bound CSP Procession', *The Daily Star*, 2 June 2006.

<sup>96</sup> Hussain, 'Electoral Reform in Bangladesh 1972-2008', 54.

146 million people in mid-2006. The world data sheet estimates that the percentage of the population under the age of 15 in mid-2006 to be 35%.<sup>97</sup> This would mean that at least 51 million people were under the legal voting age and this is not taking into account those aged 15-18 and others excluded from voting as per the laws of the country.

NGOs such as Brotee and the Bangladesh chapter of the National Democratic Institute<sup>98</sup> did field surveys and validated the opposition party's claim that the voter list was inflated. The field surveys found that some of the enumerators were openly partisan, that local political elites often interfered in the enumeration process and that some enumerators were not visiting areas with large number of religious or ethnic minorities.<sup>99</sup> The Bangladesh chapter of the National Democratic Institute and Brotee found that there were approximately 12 million extra names on the list. Brotee undertook a door-to-door enumeration of voters in 28 constituencies and found that the electoral roll prepared by the Election Commission contained 17.3% excess voters.<sup>100</sup>

#### **4.3.1.1. Rabmat Ali v Election Commission**

The 2006 list became even more controversial when the two other Election Commissioners, M.M Munsef Ali and A.K Mohammed Ali, made a statement that the decision to prepare a 'fresh' electoral roll rather than updating the existing electoral roll from 2000, was a decision taken unilaterally by the Chief Election Commissioner without their consent.<sup>101</sup> As a result of this statement, two writ petitions in the form of Public Interest Litigations were filed with the High Court challenging the decision of the Chief Election Commissioner to prepare a fresh voter list, on the grounds that the unilateral

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<sup>97</sup> 2006 World Population Data Sheet, Population Reference Bureau.

<sup>98</sup> National Democratic Institute is a Non-Profit organization funded by the US Democratic Party in order to support and strengthen democratic institutions in developing countries.

<sup>99</sup> Huda, 'Challenges in Management of Electoral Rolls'.

<sup>100</sup> Brotee Website <<http://www.brotee.org/elections.html>> (Accessed on 9 September 2015).

<sup>101</sup> Kumaraswamy and Datta, 'Democracy in Bangladesh: From Fragility to Collapse?'.

decision of the Chief Election Commissioner to prepare a fresh voter list, ignoring the objections of the two other members of the Commission, was a decision not made by the Election Commission but by the Chief Election Commissioner alone.<sup>102</sup> The petitioner, Awami League Member of Parliament Rahmat Ali asserted that:

*The Commission means a Commission within the meaning of Article 118 of the Constitution which provides that there shall be an Election Commission for Bangladesh consisting of a Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time direct and the appointment of the Chief Election Commissioner and other Election Commissioners (if any) shall, subject to the provisions of any law made in that behalf be made by the President and since at the moment the Election Commission is consisted of the Chief Election Commissioner and two other Commissioners, the Commission must mean a composite body consisting of all the three and a Chief Election Commissioner alone is not the Election Commission and unless a decision is taken by the Commission this is no decision in the eye of law.*<sup>103</sup>

In response, the Election Commission submitted that the decision was taken by the Commission in its meeting of 6 August 2005.<sup>104</sup> On 4 January 2006 the High Court ruled in favor of the petitioners and found that the Election Commission must work institutionally and not individually. The High Court also found that the decision was not made unilaterally because the decision taken by the Election Commission on 6 August 2005 was only to ‘prepare a voter list’. According to the court’s assessment, no agreement had been arrived at as to the method of the preparation – whether this would be by updating the 2000 voter list or preparation of a new list. The High Court directed the Election Commission to prepare the Electoral Roll taking into account the existing

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<sup>102</sup> Rahmat Ali v Election Commission, 11 BLC (2006) 380.

<sup>103</sup> Civil Petition No. 9157 (2005).

<sup>104</sup> Rahmat Ali v Election Commission, 11 BLC (2006) 380.

roll as persons whose names were already on the list may be dropped if they are not available at the time the enumerators visit their residence. The High Court also observed that:

*The papers produced before us give a dismal picture of the Election Commission. The Commission took a decision in the meeting held on 6<sup>th</sup> of August for preparation of Electoral Roll and appointment of Registration Officer, etc. but subsequently the Chief Election Commissioner is claiming that the decision was for fresh voter list while another Commissioner is claiming that it was for a revised list. Yet another Commissioner is claiming against records that no such decision was taken on 6<sup>th</sup> of August.*<sup>105</sup>

The Court further stated that:

*It is for the Commission to decide whether the Electoral Roll should be prepared or corrected and amended or revised but it appears that the Commission is sharing the opinion of the political parties as to what to do, creating scope for controversies which should have been avoided.*<sup>106</sup>

Despite the High Court ruling, the Election Commission continued the process of preparing a fresh electoral roll while appealing to the Appellate Division.<sup>107</sup> The Chief Election Commissioner opined that an observation by the High Court did not make it mandatory to discontinue a process already begun. This decision by the Chief Election Commissioner was not supported by the two other Commissioners and created a greater rift within the Election Commission.<sup>108</sup> The Election Commission's decision to not heed the High Court's ruling also led to escalating accusations and public perception that the Election Commission was acting partisan. In May 2006, the Appellate Division upheld

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<sup>105</sup> Rahmat Ali v Election Commission, 11 BLC (2006) 380.

<sup>106</sup> Rahmat Ali v Election Commission, 11 BLC (2006) 380.

<sup>107</sup> 'Election Commission decision on voter listing ignores SC order again', *The Daily Star*, 21 June 2006.

<sup>108</sup> Hussain, 'Electoral Reform in Bangladesh 1972-2008', 54.

the High Court judgment and issued a contempt ruling against the Chief Election Commissioner and the Acting Secretary of the Commission for not complying with the High Court ruling.<sup>109</sup>

In the wake of the Supreme Court decision, the Chief Election Commissioner decided not to update the voter list using the 2001 list as the basis, but rather announced that it would be up to each voter to check and correct his or her entry on the 2001 list.<sup>110</sup> By the middle of June 2006 the Election Commission had lost all credibility and the confidence of the public. During an interview, a Supreme Court lawyer involved in filing the voter list writ told the researcher:<sup>111</sup>

*MA Aziz and his actions.. and you have seen the result of that. The Election Commission made themselves controversial first of all by taking the decision by scrapping the earlier electoral roll saying that we will create a fresh electoral roll. Which was actually the catalyst for election engineering. They were thinking that they had identified the pockets of the Awami League people and they will be disfranchised by manipulation of the list. Once your name is ousted from the list it is a hell of a job to insert your name. So if you could actually do that you could do the election engineering at a massive scale. So that has become the biggest hallmark to say that holding election under the political government is not possible in Bangladesh.*<sup>112</sup>

Under mounting pressure, the Election Commission relented and on 7 July 2006 announced that the Election Commission had amended its position based on the opinion of opposition political parties (i.e. Awami League) and civil society, and that a new enumeration process would take place between July and August in order to revise the

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<sup>109</sup> Election Commission v Al Haj Advocate Rahmat Ali and Others, 2006, 35 CLC (AD) (1900).

<sup>110</sup> Hussain, 'Electoral Reform in Bangladesh 1972-2008', 54.

<sup>111</sup> Interview A14.

<sup>112</sup> Interview A14.

voter list.<sup>113</sup> However, the new enumeration process was also criticized as inflated and the number of voters registered remained similar to the original challenged list.<sup>114</sup>

The quality of the voter list became one of the main rallying points of the Awami League and made the upcoming Parliamentary elections to be held in January 2007 controversial. The Election Commissions handling of the registration process and its failure in upholding the High Court judgment 'marked it as irredeemably partisan in the eyes of the opposition and much of the media'.<sup>115</sup> By the end of 2006, supporters of the Awami League began to protest and demand MA Aziz's resignation and reconstitution of the Election Commission.<sup>116</sup> The ensuing violence resulted in the President increasing the number of Commissioners from three to five. These appointments made between September and November 2006 added fuel to the fire as the opposition and the media claimed that the new appointees were also partisan.<sup>117</sup> Finally, the entire opposition (Awami League and its allies) boycotted the 9<sup>th</sup> parliamentary election altogether, on the grounds that the Election Commission and Chief Election Commissioner were partisan.<sup>118</sup> The result of the voter list crisis and the perception this created about the Election Commission led to what Pastor defines as a 'flawed' election, in that it eventually led to opposition boycott of the scheduled 2007 election. It also resulted in the first major breakdown in Bangladesh's democratic journey since 1991. Following months of political violence President Iajuddin Ahmed declared a state of emergency on 11 January 2007. The elections, which were to be held on 22 January 2007 were postponed indefinitely, and the sitting Caretaker Government (which the Awami League

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<sup>113</sup> 'The case of voter identification', *The Daily Star*, 26 January 2007, Dhaka.

<sup>114</sup> 'The case of voter identification', *The Daily Star*, 26 January 2007, Dhaka.

<sup>115</sup> Hussain 'Electoral Reform in Bangladesh 1972-2008', 57.

<sup>116</sup> 'Movement Unto Aziz's Resignation', *The Daily Star*, 11 November 2006, Dhaka.

<sup>117</sup> Hussain, 'Electoral Reform in Bangladesh 1972-2008', 57.

<sup>118</sup> Eckstein, Jeremy, 'A Bangladesh Case Study: Technical Electoral Assistance and Deeply Divided Politics', The Ace Project <<http://aceproject.org/ace-en/focus/focus-on-effective-electoral-assistance/a-bangladesh-case-study-technical-electoral>> (Accessed on 3 September 2015).

accused of being partisan) was replaced by a new Caretaker Government. The new Caretaker Government constituted after declaration of emergency postponed elections for two years and kept the state of emergency in place throughout its term.

The voter list crisis of 2006 shows us how flawed implementation of formal rules, in this case a flawed electoral roll, can lead to democratic breakdown. The researcher contends that the reason that the electoral roll was tampered with by the Election Commission is because of the presence of patronage in the appointment process of Commissioners that led to partisan and personalized implementation of the law. The following discussion of a writ petition filed at the High Court by an assistant registration officer of the Election Commission, and the description of the events that preceded the filing of the case, allows an explanation of the workings of informal institutions within the Election Commission.

#### 4.3.1.2. *Al Haj Aminul Bhuiyan v Bangladesh and Others, Writ Petition No. 4674 of 2006*

In 2006 the method of preparing the electoral roll was set out in the Electoral Rolls Ordinance (1982).<sup>119</sup> The Ordinance also set out the conduct expected by election officials responsible for voter registration. Section 18 and 19 of the Electoral Rolls Ordinance set out the punishment for making false declarations and for breach of duty in relation to the electoral role. Section 18 stated:

*If any person makes in connection with (a) the preparation, revision or correction of a electoral roll (b) the inclusion or deletion of any entry in or from an electoral roll a statement or declaration which is false and which he knows or believes to be false or does not believe to be*

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<sup>119</sup> The Ordinance was promulgated in 1982 under martial law by President Ershad, the Chief Martial Law Administrator, and continued to be in force until 2009.



*true, he shall be punishable by imprisonment for a term which may extend to six months or with fine which may extend to take one thousand, or with both.*<sup>120</sup>

The punishment for elections officers was more severe. Section 19 of the Electoral Rolls Ordinance stated that:

*If any Registration Officer, Assistant Registration Officer or other person required by or under this Ordinance to perform any duty in connection with the preparation, revision or correction of an electoral roll or the inclusion or deletion of any entry in or from that roll is, without reasonable cause, guilty of any act or willful omission in breach of such duty, he shall be punishable by imprisonment for a term which may extend to one year, or a fine which may extend to taka five thousand, or with both.*<sup>121</sup>

Despite laws protecting the sanctity of the voter list, in Bangladesh voter lists have consistently been controversial. While the researcher was working at Dr. Kamal Hossain and Associates in Dhaka in 2006, Bangladesh was also going through its greatest ever crisis with regards to the voter list as discussed in the previous section of this chapter (4.3.1.1.). While it is generally accepted that the 2006 voter list was grossly manipulated, the researcher has been able to analyse one particular incident that highlights one of the methods used by the Election Commission and the government to inflate the voter list. In turn, the case study highlights the gap between how institutions in Bangladesh function in practice and how they are expected to function according to the formal rules. It also provides a glimpse into the nature of informal institutions. *Al Haj Aminul Bhuiyan v Bangladesh and Others*<sup>122</sup> is an unreported case but the researcher was able to derive evidence from documents uncovered from the Supreme Court archives and the archives

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<sup>120</sup> S.18, Electoral Rolls Ordinance, 1982.

<sup>121</sup> S.19, Electoral Rolls Ordinance, 1982.

<sup>122</sup> Writ Petition No. 4674 of 2006 (This is an unreported case. The researcher was provided with the case files from the chamber of Dr. Kamal Hossain).

of Dr. Kamal Hossain and Associates. The documents relied on in highlighting the institutional flaws of the Election Commission include the order given by the High Court in Writ Petition No 4674 of 2006 (derived from the High Court archives), petition filed by the petitioner and the letters and memos sent out by the Election Commission and election officers to the petitioner (given to the researcher from the archives of Dr. Kamal Hossain and Associates) and newspaper reports particularly from the daily Prothom Alo. The researcher also conducted interviews with the lawyers representing the petitioner, officials from the Election Commission and past enumerators of the Election Commission, in order to understand the dynamics under which enumerators are appointed and function. The interviews also provided the researcher with a more nuanced understanding of the case.

In 2006 Aminul Haq Bhuiyan was the Assistant Headmaster of Shere Bangla Nagar Government Boy's High School. The Election Commission appointed him as Assistant Registration Officer of Ward no. 41 under Mohammadpur Police Station in November 2005.<sup>123</sup> In Bangladesh, it is traditionally public school teachers who are appointed as enumerators. It is also very common that teachers have strong political leanings – appointments in public schools as teachers and head teachers are amongst the most coveted positions in rural Bangladesh. In addition, such appointments are used as patronage benefits to be distributed by successive governments.<sup>124</sup> During interviews conducted with Members of Parliament of the Jatiyo Sangshad, the researcher was repeatedly told that one of the main demands of voters are jobs – and the job of headmaster of Upazila schools are extremely coveted positions associated with respect

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<sup>123</sup> Original Civil Petition Submitted on behalf of Abdul Hakim Bhuiyan. Civil Petition on file with author.

<sup>124</sup> See generally, Pranab Kumar Panday, 'Impact of Politicization of the Recruitment of University Teachers in Bangladesh: The case of the University of Rajshahi', <[http://www.researchgate.net/profile/Pranab\\_Panday/publication/228662214\\_Impact\\_of\\_Politicization\\_on\\_the\\_Recruitment\\_of\\_University\\_Teachers\\_in\\_Bangladesh\\_The\\_Case\\_of\\_the\\_University\\_of\\_Rajshahi/links/00b7d51d6cd2bb556e000000.pdf](http://www.researchgate.net/profile/Pranab_Panday/publication/228662214_Impact_of_Politicization_on_the_Recruitment_of_University_Teachers_in_Bangladesh_The_Case_of_the_University_of_Rajshahi/links/00b7d51d6cd2bb556e000000.pdf)> (Accessed on 3 September 2015).

for the whole family. For example, in an interview with a Member of Parliament and senior member of the Awami League, the researcher was told:

*What they want is for us to help their children go to school. The other thing they want is a job. However it is done the Member of Parliament needs to give their son a job. They also come with personal problems, medical problems, work issues, how can they earn? And for help with access to government offices.*<sup>125</sup>

On a similar note, another Member of Parliament stated:

*I am a Member of Parliament now and people's expectations from me are skyrocketing. They think he is a minister so of course he can give my son a job. Even this morning I was told 'Brother, my son will give the exam please give him the job'. But it is not possible for me to give a job to everyone. If I find them a job they will say 'Faruk bhai gave my son a job so I will vote for him... and if he doesn't get a job... they will say I did not give them a job...'*<sup>126</sup>

Finally, a Former Minister for Law and Parliamentary Affairs claimed that:

*One is the personal aspect, which is the most important demand – that is job. They want a job. A job for the young boy, mother wants job for the son. This is very important for them. And then... meyer biye dibe (the daughter's wedding), this is a continuous demand we receive when we go to our respective areas. At the personal level, there are personal needs. Then like medical treatment, the child is not well, he needs to be treated and taken to hospital, they expect that I should be able to arrange for something.*<sup>127</sup>

Thus, Members of Parliament are compelled to distribute local public office jobs to their supporters/clients, which in turn leads to the politicization of public institutions including public schools, whose teachers are usually recruited as enumerators. For

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<sup>125</sup> Interview A7. Translations are the author's own.

<sup>126</sup> Interview J. Translations are the author's own.

<sup>127</sup> Interview T.

example, in an interview with a teacher at the Kaplan Bajar Prathomik Bidaloy, conducted in Comilla on 22 December 2014, the researcher was informed that:

*‘There are ten of us teachers at Kaplan Bajar Shorkari Prothamik Bidaloy and we are all more or less Awami League. Everyone supports either the Bangladesh Nationalist Party or the Awami League. Whichever party is in power, at the time their supporters are happy. Such as, when Bangladesh Nationalist Party was in power, we weren’t even allowed to go to the school. We were stopped. We suffered a lot’.*<sup>128</sup>

As Assistant Registration Officer, Bhuiyan was directed by the Election Commission to appoint 8 supervisors and 33 enumerators in order to assist with the electoral roll to come into effect from 1 January 2006. Accordingly, he appointed the supervisors and enumerators from amongst 55 teachers serving at the Shere Bangla Nagar Government Boy’s High School. The Election Commission approved all the appointments. These enumerators conducted door-to-door visits from 1 January 2006 until 15 February. As per instructions from the Election Commission, Bhuiyan also directed the enumerators and the supervisors to inform all residents of the area to notify the petitioner by 28 February 2006 in the event their name had been omitted from the voter list.<sup>129</sup>

In March 2006, after the closing of the voter list Bhuiyan received a phone call from the Thana Election Officer for Mohammadpur, Afroza Khanam.<sup>130</sup> She informed him that some persons had been excluded from the voter list and that their names should be included in the voter list for Ward No. 41.<sup>131</sup> The assistant Registration Officer, Bhuiyan asked Afroza Khanam when she had been appointed and was informed she had been

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<sup>128</sup> Interview A5. Translations are the author’s own.

<sup>129</sup> Events described in the Writ Petition Submitted on behalf of Abdul Hakim Bhuiyan (4674 of 2006). Petition on file with author.

<sup>130</sup> Thana (meaning police station) are also known as Upazilas. These are sub-districts controlled by a particular police station. Upazilas are also referred to as thanas particularly in cities. This case study is set in Dhaka.

<sup>131</sup> Events described in the Writ Petition Submitted on behalf of Abdul Hakim Bhuiyan (4674 of 2006).

appointed a few months ago. Bhuiyan informed Afroza Khanam over the phone that he would not be able to include the names, as there was no procedure to do so after the 28 of February 2006.<sup>132</sup>

On 13 March 2006, the petitioner received a letter from Afroza Khanam<sup>133</sup> forwarding 900 Voter Registration Forms supposedly completed by an enumerator named Atiquel Islam. However, Bhuiyan had not appointed any enumerator named Atiquel Islam or issued any registration forms to him and therefore refused to include the 900 names in the voter list for Ward 41. Upon questioning the locals in the area, Bhuiyan was informed that Atiquel Islam was the husband of Salma Islam, who was the General Secretary of the local unit of the Bangladesh Nationalist Party women's party, one of the front organizations of the Bangladesh Nationalist Party, the party in government in 2006. This was later confirmed by press reports. On 17 May 2006, the daily *Prothom Alo* reported that Atiquel Islam was the husband of Salma Islam and also worked for the local Ward Commissioner Abu Bakar Siddique, a leader of the Bangladesh Nationalist Party.<sup>134</sup> This shows the extent of personalization of politics in Bangladesh, whereby the functions of formal institutions are often performed by persons embroiled in informal and personalized relationships, thereby the actors intentions conflict with the intention of the formal institution, in this case the compilation of an accurate voter list.

Following the letter from Afroza Khanam sent on 13 March 2006, on or around 23 March 2006, Bhuiyan received a phone call from Abul Kashem, Deputy Secretary of the Election Commission Secretariat. The position of the Deputy Secretary of the Election Commission Secretariat is much higher than that of an Assistant Registration Officer.

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<sup>132</sup> Events described in the Writ Petition Submitted on behalf of Abdul Hakim Bhuiyan (4674 of 2006).

<sup>133</sup> A copy of the letter on file with the author. (Matter No. Thana/Mohammadpur/7).

<sup>134</sup> '900 voter form puronkari atik shikhok non: BNP netrir shami', 17 May 2006, *Prothom Alo*, Dhaka.

The Deputy Secretary ordered Bhuiyan to go to the Election Commission to meet with him. Upon going to the Election Commission the Deputy Secretary questioned him on what the issue was with the 900 voters in his Ward. During the meeting, Afroza Khanam along with Shamsul Alam, one of the District Election Officer's for Dhaka, were also called in. The Deputy Secretary of the Election Commission asked these persons to explain in front of Bhuiyan how and on what authority the 900 names should be included in the voter list. Afroza Khanam replied that she had taken verbal authority from the District Election Officer. The District Election Officer contradicted her statement and said he had not given any such permission.<sup>135</sup>

Following the meeting of 23 March 2006, on 2 April 2006, Bhuiyan received a letter from Afroza Khanam directing him to include the 900 voters in the voter list and to appoint Atiqul Islam as an enumerator.<sup>136</sup> On the same day, the Assistant Registration Officer also received a letter from Shamsul Alam, District Election Officer for Dhaka, stating that Atiqul Islam, a teacher of Shyamoli Pre- Cadet School in Muhammadpur had been directed to enlist 900 voters by the Thana Election Officer (Afroza Khanam) due to complaints that the names of these voters had been excluded from the voter list. The letter also directed Bhuiyan to include any person entitled to be included in the voter list and directed him to appoint Atiqul Islam as an Enumerator.<sup>137</sup>

After the meeting, Bhuiyan sent enumerators and supervisors to verify the validity of the 900 voters. They found that there were no voters as described on the list. On 6 April 2006, Bhuiyan received another letter from the District Election Officer, Shamsul Alam. In this letter he was informed that the Election Commission had appointed five teams to scrutinize the 900 forms and that it was found that certain voters had been excluded

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<sup>135</sup> Events described in the Writ Petition Submitted on behalf of Abdul Hakim Bhuiyan (4674 of 2006).

<sup>136</sup> A copy of the letter is on file with the author (Matter No. Thana/ Mohammadpur/2006/9)

<sup>137</sup> A copy of the letter is on file with the author. (Matter No. 3,Dhaka/5(1)/2005/93)

from the voter list. Bhuiyan was asked to include at least 693 persons that the Election Commission found were qualified to be voters. The letter stated that from the list of 900 it was found that 20 persons were not qualified to be voters. The letter also reiterated that Atiqul Islam should be appointed as an enumerator.<sup>138</sup>

On 17 May 2006, Bhuiyan gave an interview to Channel I, a private television channel in Bangladesh. The journalists asked him about the 900 voter forms. The interview was broadcasted on Channel I and newspaper reports based on the interview were published the next day.<sup>139</sup> Following these reports, on 18 May 2006, Bhuiyan received a phone call from the District Election Officer, Shamsul Alam, who requested him to come for a meeting to his office. At the meeting Bhuiyan was questioned about what he had said to Channel I and was asked to issue a press release contradicting his earlier statements. Bhuiyan refused to contradict the statements made to Channel I. At this point, the District Election Officer received a phone call from the Chief Election Commissioner (MA Aziz) who requested the petitioner to attend the Election Commission. At the Election Commission Secretariat, the petitioner was questioned by the Deputy Secretary (Elections), Mihir Sarwar Murshid. The petitioner was questioned about the interview he gave to Channel I and was accused of having leaked the letter sent on 3 March 2006 by Afroza Khanam in order to support the Awami League's accusations of a fraudulent voter list and to lend credence to the writ petition challenging the voter list filed by opposition Member of Parliament Rahamat Ali in the Supreme Court (as discussed above in Section 4.3.1.1.). Bhuiyan was then asked to return to his office accompanied by a Magistrate and the District Elections Officer in the presence of a police escort and return the 900 voter registration forms to the Election Commission. The petitioner requested that he did not need to be escorted because he would comply with the

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<sup>138</sup> A copy of the letter is on file with the author. (Matter No. 3, Dhaka/5(1)/2005/95)

<sup>139</sup> Original Writ Petition Submitted on behalf of Abdul Hakim Bhuiyan (4674 of 2006).

direction as long as he received a written instruction from the Election Commission to return the forms. At this point, according to the petition filed with the High Court, the petitioner was threatened by various persons including Mihir Sarwar Murshid (Deputy Secretary, Elections). He was told that if he did not return the 900 voter forms he would lose his job as would others working under him. Murshid then asked the petitioner to sign a piece of paper, which he was not allowed to read. According to the writ petition filed with the High Court, Bhuiyan signed the paper because he felt threatened.<sup>140</sup>

From 18 May 2006 until the writ petition was filed, Bhuiyan received ‘innumerable phone calls on his mobile phone threatening him and his family with dire consequences unless he deposit[ed] the forms relating to the 900 voters at the Election Commission Secretariat’.<sup>141</sup> Following such harassment, Bhuiyan approached Dr. Kamal Hossain and Associates. A writ petition under Article 102 of the Constitution was filed before the High Court division.<sup>142</sup> The writ petition pleaded that the order issued by Afroza Khanam on 6 May 2005, directing the petitioner to enlist 900 voters who had not been included in the voters list, and the orders dated 18 May 2006, issued by the Deputy Secretary (elections), Mihir Murshed, directing the petitioner to hand over to him the said list of 900 voters to him were ‘wholly arbitrary mala fide and without any lawful basis’.<sup>143</sup> The petition pleaded that these directions and letters by the Election Commission were in gross violation of the petitioners fundamental rights, particularly the right to treatment in accordance with the law and freedom of expression as protected by the Constitution, and also violated the Electoral Rolls Ordinance (1982) and Electoral Rules (1982). The High Court found in favor of the petitioner and declared the Election Commission’s direction to include the 900 names and appoint Atiqul Islam as an enumerator to be

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<sup>140</sup> Writ Petition Submitted on behalf of Abdul Hakim Bhuiyan (No. 4674 of 2006).

<sup>141</sup> Writ Petition Submitted on behalf of Abdul Hakim Bhuiyan (No. 4674 of 2006).

<sup>142</sup> Article 102 of the Bangladesh Constitution gives writ jurisdiction to the High Court.

<sup>143</sup> Judgment given on 21 May 2006 in Writ Petition No. 4674 of 2006. A copy of the judgment is on file with the author.



without lawful authority and unconstitutional, and ‘contrary to the public interest in maintaining the integrity and impartiality of the Election Commission as guaranteed by Article 118 of the Constitution’.<sup>144</sup> However, the direction of the High Court went only so far as to stop harassment of Mr. Bhuiyan, but no specific punishment was enforced on the election officers involved in the attempted insertion of fake names into the voter list, despite these acts being punishable offences under the Electoral Rolls Ordinance (1982),<sup>145</sup> as set out above. Thus, the court order stopped the insertion of these particular 900 names into the voter list, but the overall voter list was in a dismal state, and finally led to violent protests and a declaration of emergency.

The above case study highlights certain aspects of informal institutions in Bangladesh. Firstly, it confirms that Election Commission Officers, from the highest level down to lower level enumerators are embroiled in an arrangement where they collude with each other to support the requirements of the party in power and the party they are loyal to. Secondly, public officials are appointed on the basis of their loyalty to the government and their willingness to overlook the formal requirements of their position in order to serve party interests. Thus, there is an exchange between higher-level patrons who provide jobs and positions and the lower-level clients who accept these. In return for their posts as officers and enumerators of the Election Commission (and perhaps even as Chief Election Commissioner), clients are expected to return the favour by ensuring that the party’s needs are attended to. It is arguable that the party’s interest also serves the interest of these public officers because they can expect to be demoted or lose their job if the party cannot come back to power. Third, that elements of violence are present in the enforcement of these informal rules are evident in that Bhuiyan began to receive threats when he refused to comply with the unwritten laws of clientelistic relations. This also

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<sup>144</sup> Judgment given on 21 May 2006 in Writ Petition No. 4674 of 2006. A copy of the judgment is on file with the author.

<sup>145</sup> Section 18 and 19, Electoral Rolls Ordinance (1982).

shows that informal institutions are not only present and followed, but are enforced in their own ways. Finally, the end result is that informal norms are distorting the outcomes of formal institutions and allowing for partisan law implementation. This results in opposition parties receiving partial treatment and loss of faith in formal institutions. In turn, opposition parties resort to informal methods such as politics of the street. The ability to mobilize requires the distribution of patronage benefits and promises by the opposition, leading to a cyclical trend whereby the formal continues to weaken while the informal continues to grow stronger.

#### **4.4. Conclusion**

Given the above case studies and an analysis of the key features that contribute to the failures of the Election Commission, it is clear that the Election Commission suffers from both formal weaknesses in its legal framework and institutional capacity as well as weaknesses in the form of informal institutions and patterns of behavior, present in the form of patronage, corruption, partisanship and personalized relationships. In terms of formal institutional weakness, the Election Commission is burdened with an appointment process, which is vulnerable to executive manipulation and also burdened with overdependence on the executive for its support structure, in terms of recruitment, execution of its decisions and budget. However, none of the actors involved in the electoral process that the researcher interviewed believed that further reforms to the legal and institutional framework of the Bangladesh Election Commission would enable genuine change. For example, a senior Lawyer of the Supreme Court and constitutional expert said to this researcher, *“The problem is even if you set up a selection commission for the*

*Election Commission – the selection commission will be partisan. Because everyone is getting something out of someone.’*<sup>146</sup>

The case studies in relation to the 2006 voter list showed that despite the existence of rules in relation to the voter list that penalize tampering, officials of the Election Commission, who are expected to protect the sanctity of the voter list, have been willing to do the bidding of the executive, and are willing to go so far as to issue threats to junior officers of the Election Commission. This shows that personalized relationships in the form of patronage and clientelism have led to further weakening of formal institutions. This supports the researcher’s contention that the shortcomings and failures of the electoral process in Bangladesh cannot be explained through an examination of formal institutions alone. Informal institutions also play a large part in weakening formal institutions of accountability and hold back the democratization process. Partisanship within the Election Commission and the backing of electoral manipulation by senior members of the Election Commission render formal electoral rules redundant. In the case of Assistant Registration Officer, Aminul Bhuiyan, the partisan and criminal demands of the senior officials of the Election Commission forced him to seek redress from the Judiciary instead of from within the Election Commission. This case study highlights the extent of executive influence and partisanship within the Election Commission and how personalized actions of officials within that institution goes against the constitutional *raison d’être* of the Election Commission.

Therefore, in Bangladesh, despite the Constitution providing for an independent Election Commission, weaknesses in the institutional design and the context in which the formal rules function makes the Bangladesh Election Commission incapable of being truly independent. The formal institutional weaknesses would perhaps not be as

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<sup>146</sup> Interview A4.

debilitating as they are, had it not been for the added burden of the informal institutions.

As one past Chief Election Commissioner told this author:

*Commissioners have ideological leanings and affiliations but because of the longstanding tradition (of liberal democracy and separation of powers) they do not manifest this in their work. And political parties also do not put pressure on them. And the ruling party never expects that the Election Commission will come to their aid. But here (in Bangladesh) unfortunately there is this politicization of the constitutional bodies. They (political parties) found that if we have neutral constitutional bodies they will create problem in our expansion and consolidation of power. So they thought that we must have our own men in those positions to create a favourable situation. Then they started appointing people who are known sympathisers. And when the actual test came these people definitely aligned themselves with the party appointing them.*<sup>147</sup>

This personalization of politics is a common feature in all clientelistic societies, where political leaders try to control the entire state apparatus through patronage appointments. As discussed in the theory chapter, the control of state resources and therefore elections become a zero-sum game in order to maintain patronage networks. The actors involved in the process, including politicians, political parties, Election Commissioners, the civil service and even voters (through vote buying and clientelistic relationships) collude to allow electoral manipulation. No substantial change has been made to the rules in relation to the appointment of Election Commissioners because political parties, particularly whoever is in the ruling coalition prefer the current rules, which allow for the executive to place their chosen commissioners in position. This brings us to the next phase of this dissertation, which will study the non-political Caretaker Government provision and how successive governments have tried to manipulate the Caretaker Government provision through constitutional amendments, in order to put in place

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<sup>147</sup> Interview A11.

formal rules that give the incumbent an advantage. This exclusion of the opposition through the use of formal institutions and formal rules forces the opposition to rely on informal methods such as street violence. This requires mobilization and the promise of future pay-offs, creating an unending cycle of conflict between the formal and informal.

## Chapter 5 – The Politics of Constitutional Amendments: The Abolition of the Non-Party Caretaker Government and Flawed Elections

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### 5.1. Introduction

The Constitution of Bangladesh came into operation on 16 December 1972, and is seen as a ‘truly a democratic Constitution’.<sup>148</sup> The Constitution was established to be the supreme law of the country, protecting fundamental rights, and providing for a parliamentary form of government amongst other provisions. Article 142 of the Constitution conferred power on Parliament to amend the Constitution through a two-third majority in Parliament. Amendatory processes are justified as an essential requirement in any constitution in order to be able to fix imperfections and to allow it to change along with changes within society with the passage of time.<sup>149</sup> However, while an amendatory process is essential to the stability of a constitution over time, it also opens up scope for abuse by legislatures; constitutions can be amended in a way that they begin to reflect the will of particular political interests.

The undermining of constitutions through constitutional amendments by very strong majorities in parliament have been observed by many scholars of comparative constitutionalism. Hatchard et al note, ‘an executive dictatorship can be introduced through piecemeal amendments of a constitution with the legislature being willing collaborators’.<sup>150</sup> In a research paper published by the Australian Parliament, Scott Bennett writes: ‘[n]ot the least of the criticisms of the (political) parties has been the inconsistency in their stance on constitutional amendment. Most notably this has involved supporting issues while in government, which are then opposed when

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<sup>148</sup> Mahmudul Islam, *Constitutional Law of Bangladesh*, (Dhaka: Mullick Brothers, 2012) 18.

<sup>149</sup> Walter Dellinger, ‘The Legitimacy of Constitutional Change: Rethinking the Amendment Process’ *Harvard Law Review* 97 (1984) 386-387.

<sup>150</sup> John Hatchard, Muna Ndulo, and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and South African Perspective* (Cambridge: Cambridge University Press, 2004) 55.

submitted by their opponents'.<sup>151</sup> This is also not an uncommon observation about political parties. In an IDEA, Netherlands Institute for Multi-Party Democracy and African Studies Centre, sponsored study on the constitutional reform process, it is observed that one of the major challenges for constitutional reform is the enticement in politics to focus on short-term, partisan gain.<sup>152</sup> The study cites examples from eight countries and highlights that in reforming constitutions, the interest of the incumbent or current political elite strongly affects the direction of the reform, and short-term interests of the incumbent can often take precedence over long-term national interest.<sup>153</sup> There are different ways in which political party interest can overtake the amendatory process including private and partisan interests. Private interests refer to the personalized ambition of the party leadership while partisan interest refers to the interest of specific political parties.<sup>154</sup> In Bangladesh, from very soon after the Constitution came into operation, constitutional amendments have been used in order to change the nature of the polity and serve the interests of the ruler or the ruling party.

To date, there have been 15 amendments made to the Bangladesh Constitution. Of these, the most important ones are the 4<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 15<sup>th</sup>. In 1974, only two years after the Constitution came into operation, Sheikh Mujib, the first President of the country, used a supermajority in Parliament to pass the 4<sup>th</sup> Amendment to the Constitution. This amendment replaced the parliamentary form of government with a presidential form, establishing a one party system, which curtailed the powers of the *Jatiyo Sangsad* (National Parliament) as described in Chapter One. After the murder of Sheikh Mujib and his family in 1975, Bangladesh entered 15 years of autocratic rule.

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<sup>151</sup> Scott Bennett, *The Politics of Constitutional Amendment*, Politics and Public Administration Group, Parliament of Australia, 2003.

<sup>152</sup> Martin Vliet, Winluck Wahiu and Augustine Magolowondo, *Constitutional Reform Processes and Political Parties: Principles for Practice*, NIMD, IDEA, ASC, 2011.

<sup>153</sup> Vliet, Wahiu and Magolowondo, 'Constitutional Reform Processes and Political Parties', 15-16.

<sup>154</sup> Vliet, Wahiu and Magolowondo, 'Constitutional Reform Processes and Political Parties', 15-16.

During this time, President Zia used Parliament to pass the 5<sup>th</sup> Amendment to the Constitution, which legitimized all the actions of the martial law authority between 1975 and 1979. The 5<sup>th</sup> Amendment also deleted secularism as one of the basic principles of state and inserted the words '*Bismillah-ar-Rahman-Ur-Rahim*' ('In the name of God, the Most Gracious, the Most Merciful') into the preamble, in order to gain support from the Muslim majority of the country.<sup>155</sup> In a similar fashion, President Ershad used the 7<sup>th</sup> Amendment to legitimize his regime. The 8<sup>th</sup> Amendment declared Islam the state religion and the 12<sup>th</sup> Amendment repealed the 4<sup>th</sup> and returned Bangladesh to the original parliamentary form of government. Other amendments during the authoritarian years were also used to manipulate the basis of the formation of the nation and change the definition of nationalism in Bangladesh in order to promote each leader's version of Bangladeshi identity.<sup>156</sup>

This chapter examines the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> amendments to the Bangladesh Constitution, focusing on the provisions relating to the 'Non-Party Caretaker Government' (hereafter referred to as the Caretaker Government), with an eye to the political circumstances under which they were passed. The 13<sup>th</sup> Amendment provided for the routine assumption of power by an interim, unelected, non-political Caretaker Government, usually headed by a former Chief Justice, prior to every national election, to be known as the 'Non-Party Caretaker Government'.<sup>157</sup> In a country mired in political confrontation and mistrust between political parties, this provision allowed for three credible national elections with an alternation of power at each of the elections. However, the 14<sup>th</sup> amendment passed in May 2004 made the Caretaker Government controversial by raising the retirement age of Supreme Court judges. The immediate past

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<sup>155</sup> See generally, Tazeen Murshid, 'State, Nation, Identity: The quest for Legitimacy in Bangladesh' *Journal of South Asian Studies* 20 (1997) 1-34.

<sup>156</sup> See generally, Murshid, 'State, Nation, Identity: The quest for Legitimacy in Bangladesh'.

<sup>157</sup> Chapter IIA 'Non-Party Caretaker Government', Constitution of Bangladesh (now repealed).



Chief Justice usually headed the Caretaker Government and the 14<sup>th</sup> amendment led to accusations that the retirement age was raised in order to ensure that the next head of the Caretaker Government would be a Chief Justice loyal to the government.<sup>158</sup> Following major political crisis and violence protesting the 14<sup>th</sup> amendment a state of emergency was declared in 2007 that lasted for two years (as discussed in previous chapters). After the emergency upon Bangladesh's returned to democratic rule the constitutionality of the Caretaker Government was challenged at the Supreme Court. In 2011, the Appellate Division of the Supreme Court of Bangladesh (the Bangladesh Supreme Court constitutes of the High Court Division and the Appellate Division) declared the Caretaker Government provision and therefore the 13<sup>th</sup> Amendment unconstitutional, on the grounds that it violated the basic structure of the Constitution, namely democracy, because the interim government was an unelected one.<sup>159</sup> The court opined:

*[...] the basic constituent of our Constitution is the administration of the Republic through their elected representatives. These two integral parts of the Constitution form a basic element, which must be preserved and cannot be altered. The Parliament has power to amend the Constitution but such power is subject to certain limitation, which is apparent from a reading of the preamble. The broad contours of the basic elements and fundamental features of the Constitution are delineated in the preamble.*<sup>160</sup>

However, the Court also held that the Caretaker Government provision should be kept in place for the next two parliamentary elections in order to maintain peace and stability in the country.<sup>161</sup> The nature of the court (size, dissenting opinions, etc.) and its decision (timing, analysis of the decision etc.) are discussed and analyzed in detail in Section 5.5.1.

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<sup>158</sup> 'A Controversial Amendment' (2004) 21 *Frontline*, World Affairs, 5-18 June 2004.

<sup>159</sup> Abdul Mannan Khan v Bangladesh, 64 DLR (AD) 169.

<sup>160</sup> Abdul Mannan Khan v Bangladesh, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005, 383.

<sup>161</sup> Abdul Mannan Khan v Bangladesh, 64 DLR (AD) 169.

A Special Committee on the 15<sup>th</sup> Amendment had also been formed after the Supreme Court verdict, in order to advise Parliament, a year before the amendment was passed and the Caretaker Government provision removed from the Constitution. The Special Committee had unanimously resolved that the Caretaker Government provision ought to be retained.<sup>162</sup> However, curiously it did not state this decision in the final report. The researcher was able to obtain records of the Special Committee meetings, which are not published, through one of the Supreme Court lawyers that she interviewed as part of this research. She was also provided with copies of unpublished letters exchanged between the Special Committee and opposition parties by members of the Special Committee that she interviewed. The researcher was able to gain access to a copy of the final report of the Committee and minutes of Parliamentary and Special Committee proceedings in relation to the 14<sup>th</sup> and 15<sup>th</sup> amendment.<sup>163</sup> This chapter discusses the Supreme Court decision and the Special Committee proceedings in detail in order to illustrate and analyze the way in which the executive have manipulated these institutions in order to pass partisan laws. The Awami League government oversaw the passage of the 15<sup>th</sup> Amendment in 2011, which repealed the 13<sup>th</sup> Amendment and abolished the Caretaker Government provision<sup>164</sup> (the 14<sup>th</sup> amendment insofar as it contributed to the politicization of the Caretaker Government and the judiciary will also be discussed in this chapter). Despite dissent from the opposition, civil society and voters, the Awami League-led super-majority Parliament disregarded the direction given by the Court that the Caretaker Government should remain in place for two more national elections and

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<sup>162</sup> From the proceedings of the 14th meeting of the Special Committee on the 15<sup>th</sup> amendment to the Constitution, held on 29 March 2011. Copy of the proceedings is on file with the author. Translations are the author's own.

<sup>163</sup> These documents are available through the Parliament Secretariat, but the Secretariat is not forthcoming in providing them – Members of Parliament interviewed for this research supported the researcher in obtaining these documents from the Parliament Secretariat.

<sup>164</sup> 'Caretaker System Abolished', *The Daily Star*, 1 July 2011.

passed the 15<sup>th</sup> Amendment. This shows that the Bangladeshi style of politics is antithetical to constitutional concepts of democracy.

The two largest political parties in Bangladesh, the Awami League and the Bangladesh Nationalist Party, have both argued for and against the Caretaker Government provision at different times. Their positions have depended on whether they have been in government or in opposition: the institution of the Caretaker Government has always been supported by the opposition and resisted by the incumbent. It was the Awami League that initially rallied for the Caretaker Government system when it was in opposition in 1996, refusing to take part in the usual constitutional processes and going to the streets when their demand was not met. In 1996 the Bangladesh Nationalist Party government resisted a 'Non-Party Caretaker Government' stating it would be undemocratic and unconstitutional. Since 2011, the tables have turned and it is the Bangladesh Nationalist Party who are taking to the streets and demanding reinstatement of the Caretaker Government provision, while the Awami League argue that it is unconstitutional and undemocratic. In the sections that follow, the researcher seeks to illustrate how constitutional amendments have fallen prey to the tug of war between these two political parties, and how they have tried to use amendments in order to manipulate the Caretaker Government provision so that it would serve their partisan electoral requirements. The chapter also looks at how judicial decisions and parliamentary committee reports have been manipulated for partisan gain by the executive, showing that formal institutions have been utilized to lend legitimacy to the informal. Changes to the electoral legal framework for partisan gain have had consequences for the nature of elections and democracy in Bangladesh. This chapter illustrates that constitutional reforms in relation to elections in Bangladesh have been passed by strong majorities in parliament for the sake of partisan gain and has affected

electoral competition by discouraging opposition parties from participating in elections. This has in turn led to flawed elections as defined by Pastor (i.e. opposition refusal to participate) and political violence.

## **5.2. Increasing Parliamentary Majorities and the Easy Passage of Constitutional Amendments**

The People's Republic of Bangladesh is a unitary state with a unicameral parliament (known as the *Jatiya Sangshad*), consisting of 300 members, directly elected from single territorial constituencies. There are also provisions for indirectly elected reserved seats for women.<sup>165</sup> Directly elected members are elected on a first-past-the-post basis. There is no requirement for an absolute majority and no turnout requirement. Since 1991 elections in Bangladesh have been held every five years (except between 2007-2008 during a two year state of emergency declared by the army-backed Neutral Caretaker Government), with an alternation of power each time, until the national election held on 5 January 2014.

Article 142 of the Constitution confers power on Parliament to amend the Constitution. The procedural requirements for constitutional amendments are slightly different and stricter than for normal Bills.<sup>166</sup> A Bill for the amendment of the Constitution must contain a long title expressly stating that it seeks to amend a provision of the Constitution, and must mention which provision it seeks to amend. A Constitutional Amendment Bill must be passed by at least a two third majority in Parliament before it can be presented to the President for his or her assent. The President then has only seven days to return the Bill or is deemed to have given assent.<sup>167</sup> The procedure set down by Article 142 is non-derogable and any diversion from the procedural

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<sup>165</sup> Article 65, Constitution of Bangladesh.

<sup>166</sup> Article 65 gives Parliament the legislative powers of the Republic.

<sup>167</sup> Article 142, Constitution of Bangladesh.

requirements will render the amendment void. While an amendatory provision is commonplace within Constitutions, the Bangladesh Constitution has an added provision, which has been one of the greatest burdens on the proper functioning of the Parliament and democratic process. Article 70 of the Bangladesh Constitution prohibits ‘floor crossing’<sup>168</sup> by the Members of Parliament. Any Member of Parliament, who was elected upon getting nomination from a political party and votes against that party, must vacate their seat in Parliament. This has far reaching consequences for the accountability of/within Parliament, as the watchdog that keeps the executive in check.<sup>169</sup>

The requirement of a two-third majority for Constitutional Amendments was inserted into the Constitution with a view to making the passage of Constitutional Amendments difficult, requiring broad consensus from Parliamentary representatives. However, Bangladeshi Parliaments show a trend of increasingly strong majorities (Table 4 is an illustration of the increasingly strong majorities in Parliament since 1991). This majority coupled with the ban on floor-crossing means that any Bill introduced by the government gets passed with an overwhelming majority.

**Table 4: Trend of Stronger Majorities in the Jatiyo Sangshad**

Parliament (Election Year)	Ruling Party (Coalition)	Number of Seats belonging to the Ruling Party (Coalition)
Fifth (1991)	Bangladesh Nationalist Party	158
Seventh (1996)	Awami League	179
Eighth (2001)	Bangladesh Nationalist Party (Four Party Alliance)	216
Ninth (2008)	Awami League (Grand Alliance)	262
Tenth (2014)	Awami League	245

Source: [www.parliament.gov.bd](http://www.parliament.gov.bd)

<sup>168</sup> Floor crossing occurs when a member of a parliamentary party votes against their party.

<sup>169</sup> Ahmed, Sabbir, ‘Article 70 of the Constitution of Bangladesh: Implications for the Process of Democratisation’, *Bangladesh Institute of International and Strategic Studies*, 24 (2010) 24.

Note 1. Opposition is Members of Parliament of parties not supporting the government or government coalition, except for the 2014 election when Jatiyo Party, an Awami League ally, formed the opposition after the election.

Note 2. Government Members of Parliament include all Members of Parliament of government coalitions.

Note 3. Women's reserved seats, which are indirectly elected are not included.

Sobhan argues that the principal feature of Bangladesh's democratic politics is the emergence of a stable two-party system. He argues that the duopolistic dominance of the two major parties has 'encouraged their insensitivity to the concerns of minor parties, their direct supporters, their voters and even to the concerns of their party rank and file.'<sup>170</sup> The sense of arrogance within the leadership of both parties is premised on the belief that within the duopolistic system the voters have no option but to vote for one party or the other. The immediate result of this 'hegemonistic perspective' of the two dominant parties, according to Sobhan, has been to perpetuate the exclusionary exercise of parliamentary power by both the Awami League and the Bangladesh Nationalist Party.<sup>171</sup> In his words, '[in] successive parliaments, the majority parties have denied equitable time-sharing with the opposition both in parliament as well as over the official electronic media. Nor have successive regimes made any more than token attempts to consult the opposition on issues of policy and governance.'<sup>172</sup> The frustration of independent Members of Parliament was recently voiced when independent lawmaker Haji Mohammad Salim made a statement with regards to the siphoning of money to Swiss Banks. Addressing the Parliament, he stated: 'Honourable Speaker, we speak out on point of order in Parliament on different national and public interest issues. You just hear our statements but do not give any rulings. As a result, nobody pays heed to it and the problems remain unresolved'.<sup>173</sup> This exclusionary mode of politics is seen as one of the primary reasons for driving the opposition out of the Parliament and onto the streets,

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<sup>170</sup> Rehman Sobhan, 'Structural Dimensions of Malgovernance in Bangladesh', *Economic and Political Weekly*, 39 (2004) 4103.

<sup>171</sup> Sobhan, 'Structural Dimensions of Malgovernance in Bangladesh', 4103.

<sup>172</sup> Sobhan, 'Structural Dimensions of Malgovernance in Bangladesh', 4103.

<sup>173</sup> 'Know who they are: MP says in JS about Swiss Bank Depositors', *The Daily Star*, 21 June 2015.

the end result being a dysfunctional Parliament.<sup>174</sup> This is known in Bangladesh as the ‘boycott’ of Parliament, when an opposition party refuses to attend parliamentary sessions. The opposition’s abandonment of Parliament also means that the government can pass any law without a dissenting voice.

The reason for Bangladesh’s ‘dysfunctional democracy’ has been partly attributed to the ‘historical baggage’ carried by the dynastic leaders of the two main political parties,<sup>175</sup> the Bangladesh Nationalist Party and the Awami League, both of which question the very legitimacy of the other to participate in politics. Being dynastic, the parties are characterized by a lack of internal democracy with a highly centralized and personalized internal governance structure vesting near absolute power in the party chairperson.<sup>176</sup> During an interview with independent Member of Parliament Fazlul Azim, who was a Parliamentarian from Bangladesh Nationalist Party but left the party prior to the 2008 election, the researcher was told:

*... the whole concept of democratization has deteriorated. There is hardly any democracy from within the party. It is one person calling the shots. In Awami League their chief, in Bangladesh Nationalist Party their chief.... Some of us have left Bangladesh Nationalist Party and why? Because we are not consulted. Unless there is proper democracy within the parties there won’t be democracy outside. And unless there are democratic practices in force at every tier you cannot expect things to change. We say Westminster parliamentary democracy but backbenchers, front benchers no one can speak against the leadership.<sup>177</sup>*

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<sup>174</sup> Moniruzzaman, M., ‘Party Politics and Political Violence in Bangladesh’, *South Asian Survey*, 16 (2009) 61-83.

<sup>175</sup> For an account of the history of the Awami League and the Bangladesh Nationalist Party and sources of personal antagonism between the two leaders, Sheikh Hasina and Khaleda Zia, see Stanley Kochanek, ‘Patron-Client Politics and Business in Bangladesh’, *Sociological Bulletin* 44 (1995): 115-17.

<sup>176</sup> Adeeba Aziz Khan, ‘NGOs, the Judiciary and Rights in Bangladesh: Just Another Face of Partisan Politics?’, *Cambridge Journal of International and Comparative Law*, 1 (2012): 260.

<sup>177</sup> Interview with Fazlul Azim.

BRAC's 'State of Governance in Bangladesh' report terms this 'the rise of partyarchy', a system where the winning party enjoys the monopoly of power for the duration of their electoral term.<sup>178</sup> As the report notes, "The innermost circle has de facto command over the entire party, legislature, parliamentary committees, procurement policies, development allocations, bureaucracy and law and order enforcement agencies".<sup>179</sup> Thus, ruling parties hardly face any resistance when passing legislation and constitutional amendments. Constitutional amendments have been strategically calculated in order to protect the continuing rule of the incumbent. This study of the constitutional amendments in relation to the Caretaker Government provision will illustrate the researcher's contention that electoral rules have become politicized because of informal patterns of partisanship, patronage and personalized politics.

### **5.3. The 13<sup>th</sup> Amendment and the introduction of the Non-Party Caretaker Government Provision**

In 1991, Bangladesh returned to a Parliamentary form of government after 15 years of authoritarian rule under President Ershad (as discussed in the introductory chapter). Political parties united to oust President Hussain Muhammed Ershad and joined together with a common demand for a non-party Caretaker Government for the purpose of holding elections. Elections held under Ershad's rule throughout the 80s were mired in controversy, and Molla writes that Ershad resorted to many of the same tactics of control as his predecessor Ziaur Rahman.<sup>180</sup> Both Zia and Ershad had attempted to use electoral politics in order to legitimise their authoritarian regimes in a country that had not experienced credible elections under a democratic regime since 1973.<sup>181</sup> Historically,

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<sup>178</sup> BRAC, 'State of Governance in Bangladesh, 2006'. 20.

<sup>179</sup> BRAC, 'State of Governance in Bangladesh, 2006'. 20.

<sup>180</sup> Gyasuddin Molla, 'Democratic Institution Building Process in Bangladesh: South Asian Experience of a New Model of a Caretaker Government in a parliamentary Framework' (2000) *Heidelberg Papers in South Asian and Comparative Politics*, Working Paper No. 3, 6.

<sup>181</sup> Nizam Ahmed 'From Monopoly to Competition: Party Politics in the Bangladesh Parliament



given Bangladesh's lapse into authoritarian rule soon after independence, there has been little experience with credible, multi-party, competitive elections under an incumbent government and so the central demand in the late 80s was for elections under a neutral Caretaker Government.

The movement against Ershad reached its height in November 1990. The opposition alliance, consisting of the Bangladesh Nationalist Party, the Awami League, the Jamaat-e-Islami and other smaller parties and alliances, gave a joint declaration stating that they would boycott and resist any elections under Ershad's regime and that they would only join polls to elect a Parliament under a Caretaker Government headed by a 'non-partisan and neutral person who will not be associated with any political party directly or indirectly, and he will not contest the elections of President, Vice-President or Parliament. No minister of his Caretaker Government will participate in any election.'<sup>182</sup> Ershad's government was unable to resist this demand, and Shahbuddin Ahmed, the Chief Justice at the time, was handed power in accordance with Article 50 of the Constitution. This was possible because Shahbuddin Ahmed replaced the incumbent Vice President and then assumed the presidency after Ershad resigned.<sup>183</sup> Shahbuddin Ahmed formed a Caretaker Government in order to hold a national election for Parliament. Elections were held on 27 February 1991, and were generally observed to be free and fair.<sup>184</sup> However, at the time it was expected that the Caretaker Government was a temporary solution in order to enable the transition to a democratic Parliamentary system.

The Bangladesh Nationalist Party formed the first democratically elected government since 1973, but within a few years of its tenure the Awami League and other opposition

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(1973-2001), *Pacific Affairs* 76 (2003) 55, 60.

<sup>182</sup> Molla, 'Democratic Institution Building Process in Bangladesh', 6.

<sup>183</sup> Yeahia Akhter and Habib Zafarullah, NonPolitical Caretaker Administration and Democratic Elections in Bangladesh: An Assessment, *Government and Opposition* 35(2000), 351.

<sup>184</sup> Akhter and Zafarullah, NonPolitical Caretaker Administration and Democratic Elections in Bangladesh, 354.

parties began to accuse it of manipulating the electoral process and institutions.<sup>185</sup> Bangladesh faced a serious political crisis for two years from 1994, until fresh elections were held in June of 1996 under the constitutional provision of a Caretaker Government.<sup>186</sup> The political deadlock that ensued began in March 1994 with the Magura Parliamentary by-election. The main opposition party, the Awami League, along with the Jatiyo Party and Jamaat-e-Islami, charged the Bangladesh Nationalist Party government with vote rigging and began to agitate once again for the appointment of a neutral Caretaker Government to supervise new elections.<sup>187</sup> According to Article 123 of the Constitution, new elections would have to be held in February 1996.<sup>188</sup> To press home their demand, the opposition parties boycotted Parliament *en masse* and enforced a series of *hartals* (nationwide strikes). When the Bangladesh Nationalist Party government continued to refuse to budge on the Caretaker Government issue, naming the demand undemocratic and unconstitutional, all 147 members of Parliament of the three opposition groups resigned on 28 December 1994. The Bangladesh Nationalist Party dissolved Parliament in November 1995 and planned to hold elections within 90 days of the dissolution as per Article 123 of the Constitution. The opposition continued to threaten electoral boycott unless a neutral Caretaker Government was put in place via constitutional amendment.<sup>189</sup>

On February 15, 1996 Parliamentary elections were held under the incumbent without the participation of any major opposition parties. The elections resulted in a landslide victory for the Bangladesh Nationalist Party, which won 289 of the 300 seats. However, voter turnout was less than 15% of the eligible electorate, and it is thought by most

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<sup>185</sup> Molla, 'Democratic Institution Building Process in Bangladesh', 10.

<sup>186</sup> Stanley Kochanek, 'Bangladesh in 1996: The 25th Year of Independence' *Asian Survey* 37(1996) 136.

<sup>187</sup> Golam Hossain, 'Bangladesh in 1994: Democracy at Risk' *Asian Survey* 35 (1994) 172.

<sup>188</sup> Article 123 stipulates that elections have to be held within 90 days of dissolution of Parliament.

<sup>189</sup> Kochanek, 'Bangladesh in 1996', 136.

analysts and independent observers that the Bangladesh Nationalist Party engaged in extensive vote rigging.<sup>190</sup> The elections were reminiscent of those held under previous authoritarian rulers in Bangladesh, and confirmed that Bangladeshi political parties were not ready to hold neutral elections under a majoritarian government. The failure of the election added fuel to the opposition demand for the creation of a neutral Caretaker Government to conduct elections, and the opposition parties declared an indefinite non-cooperation movement beginning on March 9, 1996.

Finally, the Bangladesh Nationalist Party government gave in and the Parliament passed the 13<sup>th</sup> Amendment to the Constitution. The 13<sup>th</sup> amendment changed the original Constitution in that it provided for a 'Non-Party Caretaker Government' to oversee elections once Parliament was dissolved. Rather than the Prime Minister and other Ministers holding office until the general Parliamentary election was held a non-elected Caretaker Government would assume power in order to oversee elections.<sup>191</sup> It mandated an eleven-member Caretaker Government to conduct the election. The immediate past Chief Justice was the first choice to become the head of the Caretaker Government. After incorporating the 13<sup>th</sup> Amendment into the Constitution, elections were held on 26 March 1996. The Awami League came to power and the elections were generally accepted as free and fair.<sup>192</sup> However, while the 13<sup>th</sup> Amendment followed opposition and civil society demands, it was passed without dialogue with the opposition or other sectors of society, without the input from Parliamentary Committees, and by a Parliament without an opposition, resulting in several weaknesses in the Caretaker

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<sup>190</sup> Molla, 'Democratic Institution Building Process in Bangladesh', 6.

<sup>191</sup> The Constitution (13<sup>th</sup> Amendment) Act, 1996.

<sup>192</sup> Akhter and Zafarullah, NonPolitical Caretaker Administration and Democratic Elections in Bangladesh, 361.

Government provision.<sup>193</sup>

The Caretaker Government provision allowed for three credible elections, but from its creation it was flawed on many levels. It was vague about the tenure of the interim government, and it provided for the former Chief Justice to head the Caretaker Government. Chief Justices heading the Caretaker Government has led to allegations that Supreme Court judges are increasingly recruited on the basis of systematic political calculation in order to ensure that the near future Chief Justice, who heads the Caretaker Government, will remain loyal to the appointing party. The 13<sup>th</sup> Amendment also created an opportunity for the power of the Prime Minister and the President to be concentrated in one individual by allowing the President to take the post of the Chief Advisor of the Caretaker Government if no other suitable candidate could be found. Despite these flaws, the Caretaker Government worked well until 2006 when the system faced its first serious crisis.

#### **5.4. The 14<sup>th</sup> Amendment and the Emergency of 2007**

In 2001, the Bangladesh Nationalist Party was once again in power and introduced the 14<sup>th</sup> Amendment to the Constitution.<sup>194</sup> The 14<sup>th</sup> Amendment raised the number of reserved seats for women, made it mandatory to put up portraits of the Prime Minister in government offices, and raised the retirement age of Supreme Court judges by two years, amongst other provisions.<sup>195</sup> The opposition and civil society viewed the 14th Amendment as a partisan decision favoring the ruling party's objectives because with the rise in retirement age, the next Caretaker Government would be headed by a perceived

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<sup>193</sup> Ali Riaz, *Bangladesh in Turmoil: A Nation on the Brink?* (2013) Testimony before the Subcommittee on Asia and the Pacific Committee on Foreign Affairs, United States House of Representatives, November 20, 2013.

<sup>194</sup> The Constitution (14<sup>th</sup> Amendment) Act 2004.

<sup>195</sup> The Constitution (14<sup>th</sup> Amendment) Act 2004.

Bangladesh Nationalist Party inclined Chief Justice, KM Hasan.<sup>196</sup> During an interview with a Bangladeshi constitutional expert and Supreme Court lawyer, the researcher was told, *KM Hasan was ambassador to Iraq during Bangladesh Nationalist Party rule and for a while had some position in Bangladesh Nationalist Party. If you read his judgments you will see he seems biased*.<sup>197</sup> KM Hasan would not have been the first choice to head the Caretaker Government had the retirement age not been raised.<sup>198</sup> According to the 13<sup>th</sup> Amendment, the President would choose the Chief Advisor from amongst recently retired Chief Justices, but traditionally it was expected that the last retired Chief Justice would lead the Caretaker Government.<sup>199</sup> By raising the retirement age of judges, KM Hasan would become the last retired Chief Justice before the next Parliamentary election and he could be appointed as the head of the Caretaker Government in accordance with previous practice. The 14<sup>th</sup> Amendment was strongly opposed by opposition groups and civil society on the grounds that raising the retirement age of Supreme Court judges would make both the Judiciary and the Caretaker Government controversial. Opponents argued that the 14<sup>th</sup> Amendment could lead to accusations that judicial appointments were being made in order to ensure that the head of the Caretaker Government would be sympathetic to the appointing party.<sup>200</sup> Thus, while the Caretaker Government was a constitutional innovation to support the constitutional guarantee of free and fair elections – it was politicizing the Judiciary, another constitutional body. Despite protests, the controversial 14<sup>th</sup> Amendment was passed without bi-partisan support or public consultation.<sup>201</sup> The Awami League, which was in opposition, did not attend parliament or vote on the amendment, having ‘boycotted’ parliament. This researcher was able to

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<sup>196</sup> Supriya Singh, ‘Bangladesh in 2006: Teetering political edifice and Democracy’ *Institute of Peace and Conflict Studies Special Report*, 35 (2007).

<sup>197</sup> Interview N.

<sup>198</sup> Interview N.

<sup>199</sup> Farooq Sobhan, ‘Bangladesh: The present situation and future outlook’, *Socio-Political and Economic Challenges in South Asia*, ed. Tan Tai Yong (London: Sage Publications, 2009) 91.

<sup>200</sup> ‘A Controversial Amendment’ *Frontline* 21 (2004) World Affairs, 5-18 June 2004.

<sup>201</sup> ‘A Controversial Amendment’, *Frontline*, 5-18 June 2004.

get a copy of the proceedings of the 14<sup>th</sup> Amendment Bill from the Parliament Secretariat. The Bill was passed 226-1 in a partial vote with only Kader Siddiqui of the Krishik Shramik Janata League voting against the Bill. All members of the Bangladesh Nationalist Party Grand Alliance that were present voted in favour of the Bill.<sup>202</sup>

As the Bangladesh Nationalist Party's second term during Bangladesh's democratic phase was coming to an end in October 2006, the opposition led by the Awami League raised their objection to the appointment of KM Hasan as the head of the Caretaker Government, because of his past involvement with the Bangladesh Nationalist Party.<sup>203</sup> The opposition parties alleged that the 14<sup>th</sup> Amendment raised the retirement age of Chief Justices so that the ruling party could appoint KM Hasan as Chief Advisor of the Caretaker Government.<sup>204</sup> Although KM Hasan eventually refused to take this office, his possible appointment became one of the major issues leading to the declaration of emergency in 2007. The 14<sup>th</sup> Amendment serves as an example of how constitutional amendments in Bangladesh, particularly in relation to elections, have become politicized and serve the interests of the ruling party at the expense of consensus and national interest.

Parliament was dissolved in October 2006 after the Bangladesh Nationalist Party government's five-year term came to an end, and a Caretaker Government was appointed in order to hold elections. However, the Awami League and its allies accused the Bangladesh Nationalist Party and its allies of installing their supporters into the Caretaker Government and the Election Commission, and claimed that the voter list was

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<sup>202</sup> Minutes of the Proceedings of the Constitution (14<sup>th</sup> Amendment) Bill, 2004, 17 March 2004. On file with Author.

<sup>203</sup> Singh, 'Bangladesh in 2006: Teetering political edifice and Democracy'.

<sup>204</sup> Mohammed Islam, 'Assumption of the Office of Chief Advisor of the Non-Party Caretaker Government in Bangladesh: A Critical Politico-Legal Analysis' *Journal of Law, Policy and Globalization*, 7(2012) 21.

grossly inflated (as discussed in the previous chapter).<sup>205</sup> The Awami League refused to participate in the election and announced that it would endeavor to prevent it from taking place. The prevention strategy consisted of wide-scale street agitation, violence, and the declaration of *hartals*.

Following months of political wrangling, and the opposition's strategy of non-stop *hartals*, the then President, Iajuddin Ahmed declared himself the Chief Advisor of the Caretaker Government, overlooking other possible constitutional options.<sup>206</sup> The opposition intensified its protests forcing Iajuddin Ahmed to resign from the post of Chief Advisor on 11 January 2007.<sup>207</sup> On the same day, in his capacity as President, Iajuddin Ahmed declared a state of emergency. The elections, which were to be held on 22 January 2007, were postponed indefinitely, and the sitting Caretaker Government (which the Awami League accused of being partisan) was replaced by a new Caretaker Government appointed by Iajuddin Ahmed. The officials of the new Caretaker Government were drawn mainly from the private sector and Fakhruddin Ahmed, a former World Bank economist and governor of Bangladesh Bank (Central Bank of Bangladesh), was appointed as the chief advisor.

The constitutionality of the new Caretaker Government of 22 January 2007 was dubious because there is nothing in the emergency provisions of the Constitution regarding the Caretaker Government<sup>208</sup> and the Constitution assumes that emergency would be declared during the term of an elected Parliament. Because the first Caretaker Government, headed by President Iajuddin, was dissolved before it served 90 days (the

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<sup>205</sup> Singh, 'Bangladesh in 2006: Teetering political edifice and Democracy'.

<sup>206</sup> Article 58 of the Constitution provided several options for who can be the Chief Advisor of the Caretaker Government before the President can takeover the functions of the Chief Advisor..

<sup>207</sup> National Democratic Institute: Election Watch Bangladesh, 'Bangladesh 2007 National Elections', 11 February 2007.

<sup>208</sup> Abu Tayeb Rafiqur Rahman 'Bangladesh Election 2008 and Beyond', (Dhaka: University Press Limited, 2008) 2.

Constitution requires the Election Commission to hold elections within 90 days of the Parliament being dissolved), the appointment of the second Caretaker Government did not violate any provisions of the Constitution. However, the issue of the Caretaker Government's validity after 90 days and under emergency rule still remained. The 22 January 2007 Caretaker Government stayed in power for almost two years with emergency in place for the entire period. Proponents of the 22 January 2007 Caretaker Government argued that the 90 day time limit did not apply to it because Article 58C(12) stipulated that 'The Non-Party Caretaker Government shall stand dissolved on the date on which the Prime Minister enters upon his office after the constitution of the new Parliament'.<sup>209</sup> This implied that a Caretaker Government can function until the new Parliament comes to being and that the 90 day limit only applied to the Election Commission because of Article 123(3) which states that 'a general election of Members of Parliament shall be held within ninety days after Parliament is dissolved'.<sup>210</sup> The two-year state of emergency, and the delay in holding elections, led to anxiety about whether Bangladesh would return to democratic rule, weakening the legitimacy of the Caretaker Government.<sup>211</sup>

The Caretaker Government finally held elections on 29 December 2008, and the Awami League came to power with an overwhelming majority. The voter turnout was the highest in the history of Bangladesh, at 85.26%,<sup>212</sup> confirming the people's mandate and faith in democracy after two years of emergency rule. Questions persisted about the constitutionality of the Caretaker Government, as its mandate had been to undertake routine government functions, and its main objective to hold democratic elections within

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<sup>209</sup> Rahman, 'Bangladesh Election 2008 and Beyond', 2.

<sup>210</sup> Rahman, 'Bangladesh Election 2008 and Beyond', 2.

<sup>211</sup> See generally, Nick Robinson, and Naureen Sattar, 'When Corruption is an Emergency: Good Governance Coups and Bangladesh', *Fordham International Law Journal*, 35(2012) 737-779.

<sup>212</sup> Voter Turnout Data for Bangladesh, IDEA, <<http://www.idea.int/vt/countryview.cfm?CountryCode=BD>> (Accessed on 11 March 2014).



ninety days of swearing in.<sup>213</sup> After assuming power, the Awami League government passed the 15<sup>th</sup> Amendment to the Constitution which repealed the system of the Caretaker Government in Bangladesh. This has been the single most far-reaching and problematic legislative act of the Ninth Parliament.

The motive behind abolishing the Caretaker Government was arguably for the government to have more control over elections and to ensure a majority of the seats in the next national election. The 15<sup>th</sup> amendment did not reflect consensus rather it reflected the partisan interest of the executive and resulted in making the electoral process partisan. The passing of this Amendment by the Awami League was particularly surprising because the Caretaker Government had initially been a demand of the Awami League and was brought about by Awami League mobilization. Bangladesh had faced months of violence and the economy had come to a standstill in 1996 because of the Awami League movement demanding a Caretaker Government to hold elections.<sup>214</sup> Civil society and the grassroots rallied behind the Awami League at the time and gave Sheikh Hasina and her party overwhelming support both in observing *hartals* and strikes, and then in electing her and the Awami League to power.<sup>215</sup> In fact, Sheikh Hasina has been on record stating that the Caretaker Government was her 'brainchild'.<sup>216</sup> The abolition of the Caretaker Government by the Awami League makes their original demand in 1996, which had mass public support, seem opportunistic and partisan. Rather than the Caretaker Government demand being one that showed the Awami League's

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<sup>213</sup> AKM Haque, 'Emergency Powers and Caretaker Government in Bangladesh', *Journal of the Australasian Law Teachers Association*, <<http://www.austlii.edu.au/au/journals/JIALawTA/2008/9.pdf>> [accessed on 21 August 2014].

<sup>214</sup> Kochanek, 'Bangladesh in 1996', 136.

<sup>215</sup> Joseph Devine, 'NGOs, Politics and Grassroots Mobilization: Evidence from Bangladesh' *Journal of South Asian Development* 1 (2006) 77, 83.

<sup>216</sup> 'Thirteenth Amendment and future of democracy', *The Daily Star*, 11 June 2011 <<http://archive.thedailystar.net/newDesign/news-details.php?nid=189434>> [accessed 7 September 2014].

commitment to furthering democracy, it now appears the demand for the Caretaker Government was for reasons of party interest. By repealing the Caretaker Government provision when the Awami League had a super-majority in Parliament, despite the fact that the majority of Bangladeshis wanted elections under a Caretaker Government,<sup>217</sup> the Awami League showed that it has no genuine commitment to the Caretaker Government as it had claimed in 1996. Rather, the Awami League repealed the provision when it no longer served their political purpose of winning the election. Ironically, the Bangladesh Nationalist Party's current demand for elections under a Caretaker Government is weakened because it too had called the system undemocratic when it was in power and resisted enacting the 13<sup>th</sup> Amendment for as long as it could.<sup>218</sup>

Thus, the Caretaker Government provision has been one that political parties demand or reject based on political expediency. Whenever a party is in power, it calls the Caretaker Government undemocratic and whenever it is in opposition, it refuses to participate in elections unless held under a Caretaker Government. The abolition of the Caretaker Government system cleared the way for elections to be held under incumbent governments.

## **5.5. Events leading up to the 15<sup>th</sup> Amendment**

The Awami League government's decision to remove the Caretaker Government provision from the Constitution was not only problematic because of the partisan nature of the amendment, which did not have popular support from citizens, but also the manner in which other formal institutions (besides the use of the super strong Parliamentary majority to pass an undesirable amendment) were manipulated by the executive in order to lend legitimacy to the amendment.

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<sup>217</sup> 'Majority Voters Want Caretaker Government', *The Dhaka Tribune*, 13 February 2014.

<sup>218</sup> Kochanek, 'Bangladesh in 1996: The 25th Year of Independence', 136.

### 5.5.1. *The Supreme Court Judgment*

In Bangladesh, Parliament is often viewed as a forum for the government to pass laws for partisan purposes.<sup>219</sup> As discussed above, the tradition of strong, centralized executive power is enhanced by structural features of the Bangladeshi parliamentary system: the tendency of elections to produce large majority governments, opposition boycott of Parliament, and strong party discipline underlined by the Article 70 constitutional ban on floor crossing. Like the 14<sup>th</sup> Amendment, the 15<sup>th</sup> Amendment that abolished the Caretaker Government system was passed amidst an opposition boycott of Parliament, with only one dissenting vote cast by an independent Member of Parliament.<sup>220</sup> The author was able to interview the lone dissenting Parliamentarian of the 15<sup>th</sup> Amendment Bill and was told:

*I was the lone independent member in a house of 350 members. We say Westminster parliamentary democracy, but backbenchers, frontbenchers... no one can speak against the leadership. The Awami League and Bangladesh Nationalist Party call all the shots. Last 24 years the whole concept of democratization has deteriorated. There is hardly any democracy from within the party. It is one person calling the shots. In Awami League it is their chief, in Bangladesh Nationalist Party their chief.*<sup>221</sup>

As a result of this perception of Parliament, the Judiciary has become the institution seen as the custodian of the Constitution and its values against encroachment by the executive government.<sup>222</sup>

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<sup>219</sup> Ahmed, *From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973-2001)* 62.

<sup>220</sup> Minutes of Parliamentary Proceedings, Constitution (Fifteenth Amendment) Bill 2011. On file with author.

<sup>221</sup> Interview I.

<sup>222</sup> For an analysis of judicial constitutional activism please see, Ridwanul Hoque, 'Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh', *Contemporary South Asia* 15(2006) 399-422.

In January 2000, a Supreme Court lawyer filed a writ petition in the form of a Public Interest Litigation with the High Court division of the Supreme Court challenging the 13<sup>th</sup> Amendment on the grounds that it was ‘violative of democracy, a basic and fundamental structure of the Constitution’.<sup>223</sup> In 2004, the High Court Division of the Supreme Court upheld the 13<sup>th</sup> Amendment on the grounds that it had ‘not affected or destroyed any basic structure or feature of the Constitution’.<sup>224</sup> In other words, the Caretaker Government provision did not negate democracy; in fact it was an aid to democracy because it allowed for free, fair and acceptable elections.<sup>225</sup> However, in 2005 an appeal against the High Court Division ruling was filed with the Appellate Division of the Supreme Court. On May 10, 2011, the Appellate Division gave its verdict on the 13<sup>th</sup> Amendment. In its verdict, the Appellate Division declared the 13<sup>th</sup> Amendment unconstitutional on the grounds that it allowed for an unelected government to assume power and therefore was undemocratic and went against the basic structure of the Constitution.<sup>226</sup> The Appellate Division opined that:

*[...] the basic constituent of our Constitution is the administration of the Republic through their elected representatives. These two integral parts of the Constitution form a basic element, which must be preserved and cannot be altered. The Parliament has power to amend the Constitution but such power is subject to certain limitation, which is apparent from a reading of the preamble. The broad contours of the basic elements and fundamental features of the Constitution are delineated in the preamble.*<sup>227</sup>

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<sup>223</sup> Abdul Mannan Khan v Bangladesh, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005, 534.

<sup>224</sup> Abdul Mannan Khan v Bangladesh, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005, 535.

<sup>225</sup> Abdul Mannan Khan v Bangladesh, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005, 535.

<sup>226</sup> Abdul Mannan Khan v Bangladesh, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005), 383.

<sup>227</sup> Abdul Mannan Khan v Bangladesh, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005, 383.

Thus, according to the majority judgment of the Appellate Division, the protection of democracy, which is a pledge in the preamble of the Constitution, means that the exercise of governmental powers, even for a temporary period, by an unelected Caretaker Government is destructive of the democratic values ensured by the Constitution.<sup>228</sup> Further, the Supreme Court decided that because Article 56 of the Constitution states that if the President has to appoint a Prime Minister or Ministers in between dissolution of a Parliament and the next general election, only persons who were Members of Parliament immediately before the dissolution could be appointed,<sup>229</sup> the appointment of a Caretaker Government violated Article 56, as the Caretaker Government cabinet did not consist of Members of Parliament.

The Appellate Division overturned the decision of the High Court on the grounds that all powers belong to the people, and the people's participation in the affairs of the state are ensured through their elected representatives. According to the judgment, being represented by elected representatives is the 'main fabric' of a parliamentary form of government. Thus, the 'main fabric' of the Constitution, which is that the people will be represented by elected representatives, cannot be altered even for a short period.<sup>230</sup>

The Supreme Court of Bangladesh has followed the basic structure jurisprudence since 1989,<sup>231</sup> and in the 13<sup>th</sup> Amendment judgment the court reiterated that while Article 142 gives Parliament the right to add, alter, substitute or repeal provisions of the Constitution, it does not give Parliament the right to abrogate, annul or change the basic features or

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<sup>228</sup> The Bangladeshi courts have been following the basic structure doctrine since the 1989 decision in *Anwar Hossain v Bangladesh* 1989, 18 CLC (AD), or the eighth amendment case. This was the first case in which the Supreme Court of Bangladesh struck down a constitutional amendment passed by Parliament. Since then the 4<sup>th</sup>, 5<sup>th</sup> and 13<sup>th</sup> amendments to the Constitution have been held to violate the basic structure of the Constitution.

<sup>229</sup> Article 56, Constitution of Bangladesh.

<sup>230</sup> *Abdul Mannan Khan v Bangladesh*, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005, 385.

<sup>231</sup> *Anwar Hossain v Bangladesh*, 1989, 18 CLC (AD).

structures of the Constitution.<sup>232</sup> The power to amend does not include the right to damage or destroy the structure and the identity of the Constitution.

However, in its judgment, the Appellate Court also stated that the elections for the future 10<sup>th</sup> and 11<sup>th</sup> Parliaments may be held under the Caretaker Government system based on the principles *quod alias non est licitum, necessitas licitum facit* (that which otherwise is not lawful, necessity makes lawful),<sup>233</sup> *salus populi suprema lex* (safety of the people is the supreme law),<sup>234</sup> and *salus reipublicae est suprema lex* (safety of the State is the supreme law).

<sup>235</sup> Thus, the Appellate Division left open a scope for the government to hold elections under the Caretaker Government formula, at least for the immediately foreseeable elections in order to avoid political confrontation and conflict. A careful reading of the judgment suggests that the Supreme Court advised that the removal of the Caretaker Government provision before the next election would put the safety of the people and the State at risk.<sup>236</sup>

The judges themselves were divided in their opinion: of the seven judges of the Appellate Division, four declared the 13<sup>th</sup> amendment unconstitutional, and three dissented. However, only a summary verdict was issued on 10 May 2011, in the form of a unanimous judgment declaring the Amendment unconstitutional. The dissenting opinions were not made public for another 14 months, when the full judgment was released. In his dissenting judgment, Justice Abdul Wahab Miah declared that the 13<sup>th</sup> Amendment was constitutional. He stated that free and fair elections is a prerequisite for democracy, and that party governments in Bangladesh when in power have used the

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<sup>232</sup> Re: Constitution of Bangladesh (13th Amendment Act Case) ADC Vol. IX (A) (2012).

<sup>233</sup> Re: Constitution of Bangladesh (13th Amendment Act Case) ADC Vol. IX (A) (2012).

<sup>234</sup> Re: Constitution of Bangladesh (13th Amendment Act Case) ADC Vol. IX (A) (2012).

<sup>235</sup> Re: Constitution of Bangladesh (13th Amendment Act Case) ADC Vol. IX (A) (2012).

<sup>236</sup> View expressed during an interview with interviewee N.

government machinery to effect the fairness of the election.<sup>237</sup> According to Justice Miah , the 13<sup>th</sup> Amendment was passed to preserve and ensure democracy and effective participation of the people in the affairs of the Republic and was a valid amendment to the Constitution. He further opined that the 13<sup>th</sup> Amendment did not amend Article 56 by appointing an interim cabinet consisting of individuals who were not Members of Parliament, but had ‘merely provided additional measures to be operative during a very short period when the general parliamentary election would be held’.<sup>238</sup>

During the hearing on the legality of the 13<sup>th</sup> Amendment, eight of the most senior lawyers in Bangladesh were called to submit their opinions as *amici curiae*.<sup>239</sup> As part of this research, the researcher interviewed three of the eight *amici curiae*. Out of the eight, five amici curiae, Dr. Kamal Hossain, TH Khan, Mahmudul Islam, Amirul Islam and Rokanuddin Mahmud recommended retaining the Caretaker Government system unchanged.<sup>240</sup> Of those that recommended keeping the Caretaker Government provision as it is, Dr. Kamal Hossain and Amirul Islam were both members of the drafting committee of the Bangladesh constitution. Two suggested alternatives to the Caretaker Government formula, but were in favor of keeping some sort of special election-time government in place. Only Ajmalul Hossain QC argued against the Caretaker Government system and was in favour of holding elections under a political government cabinet.<sup>241</sup> Ajmalul Hossain QC relied heavily on Indian case law for his submission and used concepts of democracy, representation, separation of powers and independence of

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<sup>237</sup> Abdul Mannan Khan v Bangladesh, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005, 535.

<sup>238</sup> Abdul Mannan Khan v Bangladesh, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005, 535.

<sup>239</sup> ‘Caretaker System Declared Illegal’, *The Daily Star*, 11 May 2011.

<sup>240</sup> Interview N and Interview A4. The researcher was given copies of the submission made to court in their capacity as amici curiae. Interviews and submissions on file with author.

<sup>241</sup> Interview E. The researcher was given a copy of the submission made to court. Interview and submission on file with author.

the Judiciary in order to argue against the constitutionality of the Caretaker Government.<sup>242</sup>

Despite their differences, the *amici curiae* were in agreement with the judges that anarchy might ensue should the election be held under a party government. Thus, the Supreme Court allowed the next two parliamentary elections to be held under a Caretaker Government. This was conditioned on the Parliament amending the provision to ensure that neither the former Chief Justices nor other judges of the Appellate Division would head the Caretaker Government.<sup>243</sup>

This ruling opened space for the Awami League Government to abolish the Caretaker Government system and hold elections under its administration. It is hard to say what would have happened had the full verdict and the dissenting opinions been released earlier. Yet, what we do know is that the government did not wait for the publication of the full judgment before passing the 15<sup>th</sup> Amendment, nor did it pay heed to the advice of the *amici curiae* or the concerns expressed by the Supreme Court about the conduct of elections under a party government. The concern in this regard is that the Awami League Government's compliance with the Supreme Court ruling was tainted with opportunism serving partisan interests. Under the terms of the ruling, it would have been legal to conduct the 10<sup>th</sup> and 11<sup>th</sup> parliamentary elections under the Caretaker Government system on the grounds of necessity and in the interests of the safety of the state.

### ***5.5.2. The Special Committee on the 15<sup>th</sup> Amendment***

It is a convention of the parliamentary system that small bodies of members, seen as representing the House itself, are given 'the consideration of questions, which, as involving points of detail or questions of technical nature, are unsuited to the House as a

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<sup>242</sup> Submission by Ajmalul Hossain in *Abdul Manan Khan v Government of Bangladesh* 64 DLR (AD) 169. On file with author.

<sup>243</sup> Re: Constitution of Bangladesh (13th Amendment Act Case) ADC Vol. IX (A) (2012).



whole.<sup>244</sup> This select committee system helps to increase the efficiency of the legislature by saving time in the House. In addition, and perhaps most importantly, the committee increases legislative control over the government by being more representative in partisan composition; it has the ability to scrutinize bills in detail, to receive expert opinion and members are allowed to speak and vote against the party line during committee meetings.<sup>245</sup> Strom characterizes parliamentary committees as ‘among the most important features of legislative organization in contemporary democracies’,<sup>246</sup> and Laundry notes that ‘all parliaments work to a greater or lesser extent through committees.’<sup>247</sup>

Similar to the British parliamentary system, special committees are a feature of Bangladeshi parliamentary convention. Article 76(1) of the Constitution provides that Parliament shall appoint from amongst its members standing committees for public accounts, privileges and such other standing committees as the Rules of Procedure of Parliament require.<sup>248</sup> Chapter 27 of the Rules of Procedure provide for special committees for matters of public importance.<sup>249</sup> Rule 209 of the Rules of Procedure provides that all Committees must prepare a report for presentation in front of the Parliament and Rule 206 sets out that the deliberations and decisions taken during Committee meetings in Bangladesh are to be recorded.<sup>250</sup> Unanimous decisions taken by Parliamentary Committees are usually recommended in the final report. Despite the Rules of Procedure, Ahmed observes that the track record of parliamentary committees

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<sup>244</sup> Thomas May, Malcolm Jack, Mark Hutton et al, *Erskine May: Parliamentary Practice* (London: Nexis Lexis, 2011) 604.

<sup>245</sup> For a detailed understanding of the workings of the Committee system in Bangladesh, see, Nizam Ahmed, ‘Parliamentary Committees and Parliamentary Government in Bangladesh’ *Contemporary South Asia* 10 (2001) 11-36.

<sup>246</sup> Kaare Strom, ‘Parliamentary Committees in European Democracies’ *The Journal of Legislative Studies* 4 (2007) 21.

<sup>247</sup> Philip Laundry, *Parliaments in the Modern World* (Dartmouth: Aldershot, 1989) 96.

<sup>248</sup> Article 76(1), Constitution of Bangladesh.

<sup>249</sup> Chapter 27, Rules of Procedure of the Bangladesh Parliament.

<sup>250</sup> Rule 206, Rules of Procedure of the Bangladesh Parliament.

in Bangladesh shows that structural/procedural, political, and behavioral drawbacks discourage their effective working.<sup>251</sup> According to Ahmed ‘rarely are reports produced by different committees debated in the House; hence the recommendations made in these reports do not have any chance of being implemented.’<sup>252</sup> During an interview with an independent Member of Parliament the researcher was told:

*The parliamentary committees are good. They somehow manage to go into details and try to deliver a good decision – but it is never paid any heed. There is no such law, which makes it binding on the executive or the Parliament. So actually it is a waste of time. Even in the last Parliament at first I took it seriously then I stopped going because these meetings mean nothing, it is a waste of time.*

*In a truly democratic system, like the senate or in the UK, parliamentary committees are so strong. Actually there is a mockery of democracy here. But where to go and where to start? We are declining in our standard.*<sup>253</sup>

The Special Committee on the 15<sup>th</sup> Amendment (hereinafter referred to as ‘Special Committee’) was formed on 21 July 2010 in accordance with Rule 266 of the Rules of Procedure of Parliament upon a proposal being put forward by the Prime Minister in order to support, advise, and give recommendations on the proposed 15<sup>th</sup> Amendment. The Committee comprised of 15 Members, chaired by Sajeda Chowdhury, Deputy Leader of the House (senior leader of the Awami League), and vice-chaired by Suranjit Sengupta, a senior Awami League politician. All but three of the remaining members belonged to the ruling Awami League. The exceptions were Anisul Islam Mahmud of the Jatiyo Party, Rashed Khan Menon of the Workers Party and Hasanul Haq Inu of JASAD

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<sup>251</sup> Ahmed, From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973-2001), 29.

<sup>252</sup> Ahmed, From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973-2001), 29.

<sup>253</sup> Interview I.

(at time of writing the latter two members are Minister for Civil Aviation and Tourism and Information (Media) in the 2014 Awami League Government). All three parties belonged to the ruling coalition in 2010. The composition of the Ninth Parliament, in which the Awami League and its coalition partners held over 270 out of the 300 directly elected seats, demonstrates the difficulties facing parliamentary institutions such as special committees that ordinarily provide a check on majoritarian and party politics in the legislature.

Despite these drawbacks, the Special Committee did hear a wide range of opinions. The Committee heard expert opinions from all sectors of society—a first for Bangladesh.<sup>254</sup> Almost 100 important personalities submitted opinions in front of the Committee, including five former Chief Justices, 18 renowned law and constitutional experts, 26 academics and intellectuals, and 26 newspaper editors. Political parties also submitted their opinion, amongst them representatives of the Awami League, Jatiyo Party, Jatiyo Samajtantrik Dal, Bangladesh Workers Party, Ganatantri Party and Bangladesh National Awami Party (NAP). However, the Bangladesh Nationalist Party and their allies failed to appear, despite receiving invitations (Jamaat-e-Islami, did not receive an invitation because of a Supreme Court ruling invalidating their registration with the Election Commission<sup>255</sup>).

Khaleda Zia, in her reply to the invitation sent by Chairperson Sajeda Chowdhury,<sup>256</sup>

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<sup>254</sup> Rule 202 of the Rules of Procedure gives the Committee the power to call for evidence from any person.

<sup>255</sup> *Khondker Delwar Hossain v Bangladesh Italian Marble Works*, 62 DLR (AD) (2010). This is also known as the Fifth Amendment Judgment which invalidated the Fifth Amendment to the Constitution on the grounds that Martial Law Proclamations cannot amend the Constitution, and Parliament cannot validate such amendments because it violates the basic structure of the Constitution. For a detailed analysis, see, Rahman, Wali-Ur, 'An Analysis of the Supreme Court Judgment on the Fifth Amendment', *Journal of International Affairs*, 30 (2009) 1-3.

<sup>256</sup> Letter from Sajeda Chowdhury, Chairperson of the Special Committee for the 15<sup>th</sup> amendment to Khaleda Zia, BNP Chairperson, dated 20 April 2011, Matter No. 11.412.009.29.01.029.2010.122. A copy of the letter is in file with author. Translations are the author's own.

stated that the Bangladesh Nationalist Party's refusal to participate was because the Minister for Law and Parliamentary Affairs had made a statement that the proposed constitutional amendment which was still to be passed by Parliament, was the present Constitution of the country.<sup>257</sup> It was only after receiving complaints against this statement that the co-chairperson of the Special Committee clarified that this was a *draft* proposal to be passed by Parliament. Thus, the Bangladesh Nationalist Party refused to participate in the Special Committee hearings because it appeared that 'the Committee was simply a farce in order to ensure the government's political gain.'<sup>258</sup>

After a year of deliberations and discussion on the 15<sup>th</sup> Amendment, the Special Committee submitted its final report to Parliament on 5 June 2011.<sup>259</sup> In the final report by the Special Committee on the 15<sup>th</sup> Amendment, the Committee gave 51 recommendations on different provisions of the Constitution, including changes to the Preamble, to the section on state religion, freedom of religion, trial of war criminals, women's representation in Parliament, presidential powers, selection of Supreme Court judges, limitations on state of emergency, and much more.<sup>260</sup> However, no mention of the Caretaker Government provision was made at all. This researcher was able to get transcripts from the 14<sup>th</sup> meeting of the Special Committee, held on 29 March 2011, during which the agenda was 'solely [to] assess the policy of the Caretaker Government

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<sup>257</sup> Letter from Khaleda Zia to Chairperson of the Special Committee for the 15<sup>th</sup> amendment to the Constitution dated 24 April 2011, Matter No. 1(1)11/ letter/80. A copy of the letter is in file with the author. Translation is the author's own.

<sup>258</sup> Letter from Khaleda Zia to Chairperson of the Special Committee for the 15<sup>th</sup> amendment to the Constitution dated 24 April 2011, Matter No. 1(1)11/ letter/80. A copy of the letter is in file with the author. Translation is the author's own.

<sup>259</sup> The author received a copy of the final report of the Special Committee on the 15<sup>th</sup> Amendment from her contacts in Parliament. It is difficult to get hold of such documents in Bangladesh because the Parliament Secretariat is not forthcoming in disclosing these reports, even when they are expected to be available to the public. During an interview with the head of a think tank, when the researcher asked about access to information from Parliament she was told 'as you know, we are considered the "enemy" and hence we get little cooperation from the authorities.'<sup>259</sup>

<sup>260</sup> Final Report of the Special Committee on the 15<sup>th</sup> Amendment. On File with author.

regime.<sup>261</sup> The transcript shows that the Committee, despite unanimously agreeing on keeping the Caretaker Government provision for the 10<sup>th</sup> and 11<sup>th</sup> Parliamentary elections, failed to include this in its final report, issued three months after the 14<sup>th</sup> meeting. Had the unanimous decision by the Special Committee to retain the Caretaker Government been made public, it would have been very difficult for the Awami League government to justify the removal of the Caretaker Government. Thus, such an important decision of the Committee and an unanimous one at that, missing from the final report suggests an inappropriate degree of influence by the executive.<sup>262</sup>

In an interview with a Bangladeshi constitutional expert the author was told:

*See the Committee for ten months sat and each one has given separate reasons for why it (the Caretaker Government provision) should be kept. And they are all people at the highest level.. Suranjit Sengupta, Amir Hossain Khosru etc. You consider the front bench, and Sajeda Chowdhury signs it. But it has no value. After this they are telling us that Parliament passed the amendment. What kind of Parliament? Then there is further discussion later saying we will see the full judgment. But no one waited for the full judgment. And the judgment makes it very clear that two more elections – 10<sup>th</sup> and 11<sup>th</sup> election – can be conducted with the 13<sup>th</sup> amendment, with a specific amendment keeping the Judiciary out. And if you read it honestly what you would advise is that you can have it with specific change within the amendment. The*

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<sup>261</sup> From the Proceedings of the 14th meeting of the Special Committee on the 15<sup>th</sup> amendment, on file with author. The minutes of the proceedings of the 14<sup>th</sup> meeting of the Special Committee on the 15<sup>th</sup> Amendment were provided to the researcher by one of the Supreme Court lawyers she was able to interview for this research. These meetings are private according to Rule 199 of the Rules of Procedure and it is very rare to be able to access the minutes of such meetings. Such access requires contact with and willingness from insiders of the Parliament Secretariat – thus, access to these minutes and knowledge gained about the process of the 15<sup>th</sup> Amendment as a result, is unique to this dissertation.

<sup>262</sup> The researcher has provided a translated summary of what each member said during the 14<sup>th</sup> meeting of the Special Committee in the Appendix.

*election should not happen without working out some basis, which will allow an inclusive election.*<sup>263</sup>

Following the Special Committee report and a parallel report from the Law, Justice and Parliamentary Affairs Standing Committee discussing the draft bill, the Constitution (Fifteenth Amendment) Bill 2011 was finalized. The salient features of the Bill included the abolition of the Caretaker Government system, that elections be held under the incumbent cabinet, that Islam be retained as state religion (but that all other religions be given 'equal status'), that '*Bismillah-Ar-Rahman-Ar Rahim*' be retained in the preamble, that Article 12 be revived to restore secularism and freedom of religion, that the people of Bangladesh be defined as 'Bangalees' and the citizens of the country be known as 'Bangladeshi', that Article 7A and 7B be inserted into the Constitution to make the abrogation or suspension of the Constitution an offence in order to end the takeover of power through extra-constitutional means, and a declaration that the basic provisions of the Constitution are not amendable. The Bill also clarified that elections would have to be held within 90 days of the dissolution of Parliament and increased the number of reserved seats for women.

Much of the advice of the Committee was included in the 15<sup>th</sup> Amendment, suggesting that the failure of the Committee to make any statement about the Caretaker Government despite extensive submissions and discussion may have been intentional. In the end, this lent the 15<sup>th</sup> Amendment the legitimacy of both a Special Committee report that did not recommend anything in relation to the Caretaker Government and a Supreme Court judgment, but the Amendment itself was made in disregard of important qualifications and recommendations made in the judgment.

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<sup>263</sup> Interview N.

The abolition of the Caretaker Government, in turn, led Bangladesh to the crisis it faced in the months leading up to the 5 January 2014 elections, and to yet another election without participation by opposition parties. This contributed to a trend, which brings into question the nature of democracy in Bangladesh, and gives rise to doubts about the democratic legitimacy of the Bangladesh Parliament.

## 5.6. Consequences for Elections

After the enactment of the 15<sup>th</sup> Amendment, opposition parties demanded the reinstatement of the Caretaker Government provisions and threatened to boycott any elections held under the ruling party's administration. On 2 December 2013, following weeks of violent protests, strikes and *hartals*, the Bangladesh Nationalist Party and its 18-party alliance announced that it would boycott the 5 January 2014 elections. With the government refusing to re-instate the Caretaker Government provisions, and the opposition refusing to accept any election without it, the United Nations became involved in order to attempt to break the deadlock after the death of an estimated 200 people since late October 2013 in election-related violence.<sup>264</sup> From 6-9 December 2013, UN Assistant Secretary General for Political Affairs Oscar Taranco visited Dhaka and met with the Prime Minister, the Foreign Minister, and leaders of major political parties, including Khaleda Zia. He also met with the Chief Election Commissioner and representatives of civil society, the media and the diplomatic community, to exchange views and to stress that the next national election should be peaceful, inclusive, and credible, giving voters real choice at the polls.<sup>265</sup> Taranco's visit, however, failed to create

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<sup>264</sup> Tahmina Anam, 'Bangladesh's Non-Election', *The New York Times*, January 28, 2014.

<sup>265</sup> Bangladesh Mission by Mr. Oscar Fernandez-Taranco, Assistant Secretary General for Political Affairs, 6-9 December 2013, Report by UNDP <[<http://www.bd.undp.org/content/bangladesh/en/home/presscenter/pressreleases/2012/12/09/bangladesh-mission-by-mr-oscar-fernandez-taranco-assistant-secretary-general-for-political-affairs-6-9-december-2012-/>](http://www.bd.undp.org/content/bangladesh/en/home/presscenter/pressreleases/2012/12/09/bangladesh-mission-by-mr-oscar-fernandez-taranco-assistant-secretary-general-for-political-affairs-6-9-december-2012-/)> (accessed 20 April 2014).

any consensus between the government and the opposition.<sup>266</sup> The Prime Minister proposed an ‘all party’ Caretaker Government, stating that rather than amending the Constitution again against the judgment of the Supreme Court, an all party cabinet could be sworn in with her as the head of the cabinet.<sup>267</sup> She offered the Bangladesh Nationalist Party any ministry they wanted, but insisted that the Bangladesh Nationalist Party should join elections within the present constitutional framework. However, the Bangladesh Nationalist Party refused to join in any election under any government headed by Sheikh Hasina, instead insisting on a ‘non-party’ Caretaker Government provision—which would require another constitutional amendment. The Election Commission had, at this time, already announced the election schedule and the government refused to postpone elections in order to negotiate with the Bangladesh Nationalist Party.

Even until a week before elections, civil society in Bangladesh was hurriedly scrabbling to seek a postponement of the elections, and make the two parties come to some sort of consensus in order to hold an inclusive and democratic election. On 28 December 2013, a citizen’s dialogue was held at the Lake Shore Hotel, arranged jointly by the Centre for Policy Dialogue, Sushanorer Jonno Nagorik (SHUJAN), Ain O Shalish Kendro (ASK) and Transparency International Bangladesh.<sup>268</sup> The theme of this dialogue was ‘Bangladesh in Crisis: Citizens’ Concern’. More than 60 civil society, academic, and business community members spoke at the occasion and agreed overwhelmingly that the 5 January elections needed to be postponed, and some sort of political agreement was needed in order to hold an inclusive, democratic election. The main demands of citizens from all sectors appeared to be a stop to the political violence, the postponement of the 5 January election, and the continuation of dialogue between political parties in order to hold an election with bi-partisan participation. The government claimed that the election

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<sup>266</sup> ‘Imperative Following Taranco’s Failed Mission’, *The Bangladesh Today*, 12 December 2013.

<sup>267</sup> ‘Bangladesh PM Hasina Proposes all-party election cabinet’, *BBC New Asia*, 18 October 2013.

<sup>268</sup> The author was in Dhaka at the time of this Dialogue and was able to participate as an expert.



had to be held on 5 January because Parliament had already been dissolved.<sup>269</sup> Members of the citizens' dialogue, for example, renowned constitutional lawyer Rafiqul Haque, claimed that the elections could be deferred up to 90 days even after the dissolution of the Ninth Parliament under the present constitutional framework.<sup>270</sup>

Despite this urging from civil society, the business community, and the international community, the Awami League government went ahead with the 5 January 2014 election. Leading up to election day, opposition groups declared a series of strikes and *bartals*, which often became violent. These saw protestors burning buses and cars, and the police shooting at protestors. On polling day itself there were 18 deaths due to election-related violence; polling stations were torched, and voter turnout was low. There were allegations that even under these circumstances, vote stealing was taking place in some polling centers, and the Bangladesh Nationalist Party termed the elections a 'scandalous farce.'<sup>271</sup>

The 10<sup>th</sup> Parliament was sworn in on 12 January 2014. The opposition parties refused to participate in the elections and 153 seats were declared uncontested. In sum, all Members of Parliament that got elected actually belong to the same political alliance. Thus, according to Pastor's definition,<sup>272</sup> the 2014 national election in Bangladesh was flawed, and more so than any other election since 1991, because of the complete refusal to participate by all major opposition parties. Since the election, the Bangladesh Nationalist Party has been marginalized, their leaders arrested on vague charges, and there is a

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<sup>269</sup> 'Credible Elections and Caretaker Government', *The Daily Star*, 18 August 2015.

<sup>270</sup> Press Report on the dialogue, '*Bangladesh in Crisis: Citizens' Concerns*', Centre for Policy Dialogue, 29 December 2013, Dhaka.

<sup>271</sup> 'Polls Disappointing', *The Daily Star*, 7 January 2014.

<sup>272</sup> Pastor defines elections as flawed when some or all major political parties refuse to participate. See, Robert Pastor, 'The Role of Electoral Administration in Democratic Transitions: Implications for Policy and Research', *Democratization* 6 (2007): 1-27.

growing fear that the government is becoming increasingly authoritarian.<sup>273</sup>

## 5.7. Conclusion

The narrative of constitutional amendments in Bangladesh in relation to the Caretaker Government is a reflection of the broader malaise of electoral reform in the country. It shows that the motivation behind electoral reform has consistently been partisan and electoral reforms have been initiated to serve the executive's interest. Political leaders view elections more as a reaffirmation of their right to lead rather than the methodology by which the people express their choice of leaders. Thus, whenever the people have chosen the 'other', political leaders have rejected election results and agitated on the streets. Indeed, since 1991 there has not been a single election in democratic Bangladesh, held under a political government that has not resulted in a win for the incumbent. Neither has there been a single election held under a Caretaker Government that did not result in an alternation of power.

The Caretaker Government was a demand of the Awami League when in opposition, because at the time it needed an institution in place that could be trusted to hold free and fair elections. However, in 2011, it was the Awami League that removed the Caretaker Government provision and called it undemocratic. Thus, as far as the Caretaker Government is concerned, arguments over its place in the democratic Constitution of Bangladesh, and demands for amendments in relation to it, have been made depending on political expediency. While the Awami League demand for a Caretaker Government in 1996 was a demand backed by popular support, the 15<sup>th</sup> Amendment and its removal of the Caretaker Government provision by an Awami League government brings to question the present Awami League government's motive. The Bangladesh Nationalist

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<sup>273</sup> 'Bangladesh: A Tragic Backward Slide on Human Rights', *Human Rights Watch* <<http://www.hrw.org/news/2014/01/21/bangladesh-tragic-backward-slide-human-rights>> (Accessed on 26 August 2014).

Party's resistance to the 15<sup>th</sup> Amendment illustrates its own motives of expediency; they used similar arguments to resist the Caretaker Government in 1996 as the Awami League is using today.

Further, the manner in which each of the constitutional amendments in relation to the Caretaker Government have been passed also point to the pathologies of politics and constitutional reform in Bangladesh. It would appear that executive control of the legislature (as the amendatory organ) has seen these Amendments passed despite resistance by opposition parties and civil society. In passing the 14<sup>th</sup> and 15<sup>th</sup> Amendments, constitutional institutions have been used as an instrument of executive power rather than serving as a source of checks and balances. The 14<sup>th</sup> Amendment made the Judiciary and judicial appointments controversial when it raised the retirement age of Supreme Court judges, quite possibly in order to ensure that the last retired Chief Justice would be partial to the incumbent. When passing the 15<sup>th</sup> Amendment, the Government used the Supreme Court and the parliamentary Special Committee to justify the amendment. Both Amendments were passed despite the violence, the ensuing political deadlock, and the recommendations of the Supreme Court. The primary consideration seems to have been securing elections under the incumbent's administration in order to continue to rule. This, in turn, subverted the right of citizens to choose their government by ensuring that no serious opposition parties would participate in the 2014 election. The Special Committee's failure to mention the Caretaker Government in its final report in 2011 is a further confirmation of the level of executive control over what is meant to be an institution of accountability. Despite unanimous agreement amongst the Special Committee members to retain the Caretaker Government provision, its failure to mention this decision in the final report reeks of partisanship, executive interference and sycophantic conformity.

The strategic interpretation and compliance with the Supreme Court judgment by the executive in the case of amendments to the Caretaker Government provision brings this thesis to the topic of the next chapter – the politicization of the Judiciary. By studying the infiltration of patronage in the appointment of judges, chapter six shows how the politicization of the Judiciary has affected when judicial development of electoral reform has been forthcoming. The author contends that electoral reforms from the Judiciary have been statist and dependent on the desires of the government of the day. The politicization of the Judiciary and the statist nature of decisions with regards to elections are illustrated by using the landmark decision on mandatory disclosure of candidates' information.

## Chapter 6 – Patronage, Politicization and a Statist Judiciary: Consequences for Judicial Development of Electoral Law

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### 6.1. Introduction

An impartial Judiciary is fundamental to rule-based governance and to sustaining a culture of accountability rather than one of impunity. As Hossain Mollah argues, a dysfunctional Judiciary impacts society more severely than any other dysfunctional institution, as it removes a forum for social grievance and reduces social attachment.<sup>1</sup> Unfortunately, according to Mollah and most other observers, impunity, rather than accountability and law-compliance, appears to be ascendant in Bangladesh.<sup>2</sup> A report on the state of governance in Bangladesh by BRAC, the largest NGO in Bangladesh, notes that the Judiciary has been particularly affected by the lack of separation of powers, which in turn has affected its ability to function as a forum for upholding the rights of citizens.<sup>3</sup> The lack of separation of powers in Bangladesh has been a direct result of the culture of patronage, which has resulted in judicial appointments being made on the basis of patronage relationships and political partisanship. The informal institution of patronage has trumped formal institutions and rendered them less effective as institutions of accountability and democratization. Throughout this chapter, the Judiciary will be viewed as a formal institution and patronage, including patronage appointments, as an informal one as defined in the theory section (Section 2.3) and as envisioned by North, O'Donnell, Brinkerhoff, Goldsmith, Lauth, Eisenstadt, Roniger etc.<sup>4</sup>

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<sup>1</sup> Awal Mollah, 'Independence of the Judiciary in Bangladesh: An Overview', *International Journal of Law and Management*, 54 (2012), 61-77.

<sup>2</sup> BRAC, 'The State of Governance in Bangladesh 2006', Dhaka, 16.

<sup>3</sup> BRAC, 'The State of Governance in Bangladesh 2006', Dhaka, 16.

<sup>4</sup> Douglass North, John Wallis, Steven Webb and Barry Weingast (Cambridge: Cambridge University Press, 2013); Guillermo O'Donnell, 'Illusions and Consolidation', *Journal of Democracy*, 7(1996): 34-51; Hans Joachim Lauth, 'Informal Institutions and Democracy', *Democratization*, 7 (2000): 21-50; Derick Brinkerhoff and Arthur Goldsmith, 'Clientelism, Patrimonialism and Democratic Governance: An Overview and Framework for Assessment and Programming', U.S. Agency for International Development Office of Democracy and Governance, December 2002

During an interview with a senior member of The Daily Star, the highest circulating English language daily in Bangladesh, the author was told:

*The main problem that Bangladesh is facing today is the failure of the separation of powers and each institution is functioning in a way to make the executive stronger. When you talk about constitutional organs, each of the organs have become damaged... The Judiciary is damaged because of the appointment process, and more and more judges are being recruited on partisan lines. This also means that the Judiciary is becoming partisan and pro-government.*<sup>5</sup>

Although judges only start performing judicial functions after their appointment, yet Ehteshamul Bari notes that the process and method of appointment of judges is the most important step towards ensuring the substantive independence of judges.<sup>6</sup> United States President Franklin D. Roosevelt had observed that the appointment of a judge on the basis of political allegiance might turn them into ‘spineless puppets’.<sup>7</sup> Similarly, Loewenstein writes that there is a high likelihood that a judge appointed on the basis of political allegiance may feel ‘indebted to those responsible for his designation... (and) the beneficiary is exposed to the human temptation to repay his debt by a pliable conduct of his office’.<sup>8</sup> In this chapter, the researcher illustrates how judicial decisions on electoral issues are impacted by the politicization of the Judiciary through patronage appointments. This is achieved by using *Abdul Momen Chowdhury and Others v Bangladesh*,<sup>9</sup> as a case study. In this case the High Court gave an order requiring electoral candidates to disclose certain information, then gave a stay on its own order and finally removed the

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and Eisenstadt and Louis Roniger, ‘Patron-Client Relations as a Model of Structuring Social Exchange’, *Comparative Studies in Society and History*, 22(1980): 42-77.

<sup>5</sup> Interview Q.

<sup>6</sup> Ehteshamul Bari, ‘The Natural Death of the Supreme Judicial Council of Bangladesh and the consequent patronage appointments to the Bench: Advocating the Establishment of an Independent Judicial Commission’, *International Review of Law*, 1 (2014) 2.

<sup>7</sup> President Franklin Roosevelt, ‘Fireside Chat’ (Mar 9, 1937).

<sup>8</sup> Karl Loewenstein, *Political Power and the Governmental Process*, (Chicago: University of Chicago Press, 1965) 231.

<sup>9</sup> *Abdul Momen Chowdhury and Others v Bangladesh* 2007, 36 CLC (AD) (8693).

stay with a change in government. The use of an electoral case that received judicial decisions during two different political regimes allows the researcher to highlight how the Judiciary may be paying undue deference to the executive and giving statist judgments. The chapter also touches on the role of civil society in Bangladesh as the torchbearers of constitutionalism. The chapter fits into the broader theme of the dissertation by highlighting how reform of formal electoral rules in Bangladesh has only been forthcoming when it does not conflict with underlying informal institutions, rules and expectations.

This chapter is divided into four sections with sub-sections. Section 6.2. discusses the state of independence of the judiciary in Bangladesh. It gives an overview of the landmark *Masdar Hossain*<sup>10</sup> judgment, which separated the Judiciary from the executive and highlights how increasing number of judicial appointments have been utilized by successive government's to appoint judges whose credentials have been questioned and who appear to be partisan, thereby politicizing the Judiciary. Section 6.3.1. touches on the dearth of literature on judicial behavior and politicization of the Judiciary in Bangladesh and goes on to illustrate the statist attitude of the Judiciary towards electoral reform by making a case study of the voters' right to information judgments during two different regimes. Interviews with lawyers of both the petitioners and appellants have provided first hand information on the court proceedings during both Bangladesh Nationalist Party and Caretaker Government regimes. Finally, the chapter concludes that judicial decisions in relation to electoral reforms have been heavily influenced by the needs of the government of the day because of politicization of the Judiciary through increasing numbers of patronage based appointments.

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<sup>10</sup> Secretary Ministry of Finance v Masder Hossain (1999) 52 DLR (AD) 82.

## 6.2. The Independence of the Judiciary and Appointment of Judges

The Constitution of Bangladesh guarantees independence to all judicial officers unconditionally. The ideal is provided by Article 22, which stipulates that the state will ensure the separation of the Judiciary from its executive organs. However, as a report by BRAC concludes, probably the most serious governance failures in Bangladesh have resulted from a lack of judicial independence<sup>11</sup> and Ridwanul Haque notes that ‘the Supreme Court has arguably paid undue deference to the executive.’<sup>12</sup> The following is an analysis of the state of judicial independence in Bangladesh.

### 6.2.1 *The Masdar Hossain Judgment*

In Bangladesh the Head of the State (the President) appoints judges of the Supreme Court, consisting of the High Court and Appellate Divisions. The lower judiciary and magistrates of the lower courts are appointed by the Ministry of Establishment and the Ministry of Law, Justice and Parliamentary Affairs, through the administrative service. The recruitment of judges through the administrative service and appointment by the Ministry of Law, Justice and Parliamentary affairs led to the filing of a writ petition with the Supreme Court in 1995 by 441 judicial officers challenging the legality of the involvement of the executive in the process of judicial appointments and budgets.<sup>13</sup> In the landmark *Secretary, Ministry of Finance v Md. Masdar Hossain* judgment delivered in 1999,<sup>14</sup> the Supreme Court’s decision included 12 directives to strengthen the independence and separation of the judiciary in line with the Constitution. The 12

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<sup>11</sup> BRAC, ‘The State of Governance in Bangladesh 2006’, 63.

<sup>12</sup> Ridwanul Hoque, ‘The Recent Emergency and the Politics of the Judiciary in Bangladesh’, *NUJS Law Review*, 2 (2009), 184.

<sup>13</sup> Writ Petition No. 2424 of 1995.

<sup>14</sup> *Secretary Ministry of Finance v Masder Hossain* (1999) 52 DLR (AD) 82.



directives were<sup>15</sup>:

- i. The judicial service is a functionally and structurally distinct and separate service from civil, executive and administrative services of the Republic and the judicial service cannot be amalgamated, abolished, replaced, mixed up and tied together with civil, executive and administrative services.
- ii. The word ‘appointments’ in Article 115 means that the President can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre-appointment rules, make rules regulating suspension and dismissal under Article 115.<sup>16</sup> But Article 115 does not contain any rule-making authority with regard to other terms and conditions of service of the Judiciary. Therefore, Article 133 of the Constitution and the Services (Reorganizations and Conditions) Act (1975), which regulate appointment and conditions of service of public servants, do not apply to judicial officers.
- iii. The creation of Bangladesh Civil Service (Judicial) cadre along with the other executive and administrative cadres under the Bangladesh Civil Service (Reorganization) Order (1980) with amendment of 1981 is *ultra vires* the Constitution. Further, Bangladesh Civil Service Recruitment Rules (1981) are inapplicable to the judicial service.
- iv. Necessary steps should be taken forthwith for the President to make Rules under Article 115 to implement its provisions, which are a constitutional mandate and not a mere enabling power. Either by legislation or by framing Rules under Article 115 or by executive order having the force of Rules, a

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<sup>15</sup> Secretary Ministry of Finance v Masder Hossain (1999) 52 DLR (AD) 82 (paraphrased by the author).

<sup>16</sup> Article 115 states that appointments to subordinate courts will be made by the President.

Judicial Services Commission should be established with majority of members from the Judiciary. The Judicial Services Commission should be responsible for recruitment to the Judicial Service on the basis of merit with the objective of achieving equality between men and women in recruitment.

- v. A separate Judicial Pay Commission should be established with powers to review the pay, allowances and other privileges of the judicial service, which shall convene at stated intervals to keep the process of review a continued one. The judicial service shall follow the recommendations of the Commission.
- vi. Rules relating to posting, promotion, grant of leave, discipline (except suspension and removal), allowances, pension and other terms and conditions of service should be enacted or framed or made separately for the judicial service and magistrates exercising judicial functions.
- vii. In exercising control and discipline of persons employed in judicial services and magistrates exercising judicial functions under Article 116,<sup>17</sup> views and opinion of the Supreme Court shall have primacy over those of the executives.
- viii. Security of tenure, Security of salary and other benefits and pension and institutional independence from the Parliament and the executive shall be secured in the law or rules made under Article 133 or in executive orders having the force of Rules.<sup>18</sup>
- ix. The executive Government shall not require the Supreme Court of Bangladesh to seek their approval to incur any expenditure on any item from the funds allocated to the Supreme Court in annual budgets, provided the expenditure incurred falls within the limit of sanctioned budgets.

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<sup>17</sup> Article 116 gives the President to control and discipline magistrates and judges of subordinate courts in consultation with the Supreme Court.

<sup>18</sup> Article 133 gives Parliament the authority to make laws in relation to appointments and conditions of service of civil servants.

- x. Members of the judicial service fall within the jurisdiction of the administrative tribunal.
- xi. For the separation of the subordinate Judiciary from the executive, if the Parliament wishes so, it can amend the Constitution to make the separation more meaningful, pronounced and effective.
- xii. Until the Judicial Pay Commission gives its first recommendation, the salary of Judges in the judicial service will continue to be governed by status quo as on 8 January 1994 and also by the further directions of the High Court Division in respect of Assistant Judges and Senior Assistant Judges. If pay increases are affected in respect of other services of the Republic before the Judicial Pay Commission gives its first recommendation, the members of judicial services will get increases in pay etc. commensurate with their special status in the Constitution and in conformity with the pay etc. that they are presently receiving.

Despite the *Masdar Hossain* decision, Harry Blair notes that the Supreme Court, presumably anxious to avoid direct confrontation with the executive, continued granting extensions for the government to comply with these requirements.<sup>19</sup> The non-party Caretaker Government of 2007-2008 (under emergency rule and the suspension of normal politics) finally began the implementation of the *Masdar Hossain* judgment in 2007. However, with the return to elected government in 2008, the attempt at genuine separation of the Judiciary seems to have diminished. In fact, since coming to power in 2008 the Awami League government has not placed the Supreme Judicial Commission Ordinance promulgated by the Caretaker Government in front of the Parliament.<sup>20</sup> The

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<sup>19</sup> Harry Blair, 'Party Overinstitutionalization, Contestation and Democratic Degradation in Bangladesh', 18.

<sup>20</sup> For a detailed study see, Bari, 'The Natural Death of the Supreme Judicial Council of Bangladesh and the consequent patronage appointments to the Bench'.

Bangladesh Judicial Service Commission for subordinate courts as required by the *Masdar Hossain* judgment remains in existence and its primary function is to conduct examinations of judicial officers, but their website does not have an annual report published since 2010.<sup>21</sup> Further, no separate secretariat has been established for the Judiciary, as envisioned in *Masdar Hossain* and the appointment, transfer and promotion of judges of the lower judiciary are still administered by the executive through the Ministry of Law, Justice and Parliamentary Affairs.<sup>22</sup> The Judiciary itself has been placid about the implementation of the *Masdar Hossain* decision and has failed to take on the executive even in relation to its own independence.<sup>23</sup>

### *6.2.2. Judicial Appointments to the Supreme Court (High Court and Appellate Division)*

In terms of the superior Courts, the institutional division this chapter and the case study is concerned with, the Constitution in Part VI, Chapter I titled ‘THE JUDICIARY’ sets out provisions concerning the composition, jurisdiction, appointment and removal of judges of the Supreme Court (which constitutes of the High Court and the Appellate Division). The Constitution originally provided that the judges of the Supreme Court ‘shall be appointed by the President, in consultation with the Chief Justice of Bangladesh.’<sup>24</sup> The original Constitution was drafted with the view that the Chief Justice was in a better position than anyone else to know about the competence, legal practice, seniority and integrity of judges.<sup>25</sup> Bari notes that this consultation process with the Chief

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<sup>21</sup> Website of the Bangladesh Judicial Service Commission:

<[http://www.jscbd.org.bd/a\\_report.php](http://www.jscbd.org.bd/a_report.php)> (Accessed on 4 September 2015).

<sup>22</sup> Zahidul Islam Biswas, ‘Do we have an independent Judiciary?’ 6 (2012).

<sup>23</sup> Adeeba Aziz Khan, ‘NGOs, the Judiciary and Rights in Bangladesh: Just Another Face of Partisan Politics?’, CJICL, 1 (2012) 274.

<sup>24</sup> Article 95, Constitution of Bangladesh.

<sup>25</sup> Part VI, Chapter I, Article 95 (1), Constitution of the People’s Republic of Bangladesh.

Justice was ‘a major safeguard against political and expedient appointments.’<sup>26</sup> However, the fourth amendment to the Constitution, passed on 25 January 1975 by Sheikh Mujib’s government, did away with the requirement to consult with the Chief Justice for the appointment of puisne judges of the Supreme Court.<sup>27</sup> The obligation was once again restored on 28 May 1976 by the First Martial Law regime of Bangladesh and then once again dispensed with by Ziaur Rahman, the founder of the Bangladesh Nationalist Party, while he was President and Chief Martial Law Administrator on 27 November 1977.

Even though there was no longer a constitutional requirement, the binding force of the convention of consultation has been examined by the High Court Division of the Supreme Court of Bangladesh. In June 2001, in his judgment in *S.N. Goswami, Advocate v Bangladesh*<sup>28</sup> Judge Syed Amirul Islam held that the convention of consultation did not have binding force. The following year, Justice Islam reversed his own decision and in *State v Chief Editor Manabjamine*<sup>29</sup> he opined that the opinion of the Chief Justice in the matter of appointment of judges must have primacy and be binding on the executive (it may be of some significance that the eighth parliamentary elections were held in October 2001 and a new government was formed by the Bangladesh Nationalist Party, replacing the Awami League government of 1991-2001). Finally, in March 2009 (during the tenure of an Awami League government), in *Md. Dastagir Hossain and Others v Md. Irdissur Rahman, Advocate and Other*,<sup>30</sup> the Appellate Division of the Supreme Court set aside Justice Islam’s decision in *State v Chief Editor Manabjamine*<sup>31</sup> as ‘not... a sound proposition of law’ and consultation with the Chief Justice for appointment of Supreme Court judges was no

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<sup>26</sup> Bari, ‘The Natural Death of the Supreme Judicial Council of Bangladesh and the consequent patronage appointments to the Bench: Advocating the Establishment of an Independent Judicial Commission’.

<sup>27</sup> Bangladesh Constitution (Fourth Amendment) Act.

<sup>28</sup> 55 DLR 332 (2003).

<sup>29</sup> 31 Chancery Law Chronicles (HCD) (2002).

<sup>30</sup> 38 Chancery Law Chronicles (AD) (2009).

<sup>31</sup> 31 Chancery Law Chronicles (HCD) (2002).

longer binding.

In 2011, after the Awami League government came to power after two years of emergency rule under the Caretaker Government (2007-2008), the original provision of presidential consultation with the Chief Justice in appointing regular judges of the Supreme Court was restored through the Constitution (Fifteenth Amendment) Act in July 2011 (this amendment and its repercussions on elections is discussed in detail in Chapter Five).<sup>32</sup> However, the 15<sup>th</sup> amendment seemed to have deliberately omitted the requirement of consultation with the Chief Justice by the President when appointing additional judges to the High Court. The initial appointment of additional judges to the High Court Division of the Supreme Court is for two-year terms before confirmation of permanent judgeship. These appointments can therefore be made by the President (on the advice of the Prime Minister) without consultation with the Chief Justice and allows for patronage and partisan appointments. In the following section the researcher will illustrate how successive governments have used the provision for additional judges to increase the number of judges in the High Court Division, often through controversial appointments, thereby politicizing the Judiciary.

### ***6.2.3. Increasing Number of Appointments of Additional Judges in the High Court Division***

Historically, Bangladesh has always prided itself on a relatively independent, impartial and non-discriminatory Judiciary.<sup>33</sup> This has especially been the case with the higher Judiciary (The Appellate Division and the High Court). However, more recently, especially since 2001, there has been increasing concern about patronage and partisan appointments in the High Court.<sup>34</sup> Between 2001 and 2006, the Bangladesh Nationalist

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<sup>32</sup> Article 95, Constitution of Bangladesh.

<sup>33</sup> Ridwanul Hoque, 'Judicial Activism in Bangladesh: A Golden Mean Approach', (Cambridge: Cambridge Scholars Publishing, 2011) 100.

<sup>34</sup> Freedom House, Countries at the Crossroads Report: Bangladesh,

Party regime appointed 45 judges to the High Court Division, giving rise to concerns about the partisan nature of these appointments and politicization of the judiciary.<sup>35</sup> The Awami League regime since 2008 has gone even further, and to date (until February 2015) there have been 68 new judicial appointments to the High Court (see Tables 5 and 6 and Figure 1 below).<sup>36</sup> These appointments have been justified on the basis of increasing workload and backlog in the Supreme Court.

**Table 5: Trend of increasing number of judicial appointments to the High Court by each successive government**

Political Regime	Date	No. of Appointments
Bangladesh Nationalist Party	1991-1996	19
Awami League	1996-2001	35
Bangladesh Nationalist Party led Four Party Alliance	2001-2006	45
Awami League	2009-2015	68

Source: Author's Compilation. Please find list of the names and dates of judges' appointment since 1991 in the appendix (Compiled together from Supreme Court Annual Reports, Extraordinary Gazettes by BG Press, Attorney General's Library and press reports)

**Table 6: Yearly number of new appointments to the High Court Division since 1991**

Year	No. of new appointments to the High Court Division
1991	3
1992	7
1993	No new judge appointed
1994	9
1995	No new judge appointed
1996	8
1997	4
1998	6
1999	7

<<https://freedomhouse.org/report/countries-crossroads/2005/bangladesh#.VUk3ZWRViko>> (Accessed on 4 September 2015).

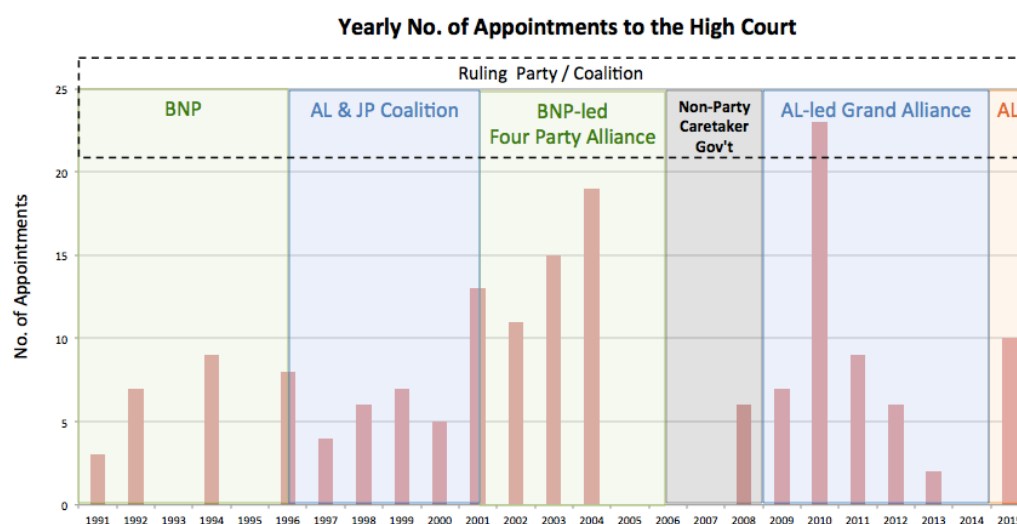
<sup>35</sup> 'Political Appointments: higher Judiciary Should Revisit the Issue', *The Daily Star*, June 9, 2007.

<sup>36</sup> 'Government Appoints Ten New Judges to the High Court', BD News, 9 February 2015.

2000	5
2001	13
2002	11
2003	15
2004	19
2005	No new judge appointed
2006	No new judge appointed
2007	No new judge appointed
2008	6
2009	7
2010	23
2011	9
2012	6
2013	2
2014	No new judge appointed
2015	10

Source: Author's Compilation. Please find list of the names and dates of judges' appointment since 1991 in the appendix (Compiled together from Supreme Court Annual Reports, Extraordinary Gazettes by BG Press, Attorney General's Library and press reports)

**Figure 1: Increasing Number of appointments to the High Court by successive political governments**



Source: Chart created by author

While there is no actual legislation setting out the criteria for the appointment of judges, traditionally and by convention appointments have been on the basis of seniority, merit



and quota.<sup>37</sup> However, since 2001, there has been increasing allegation that judges have been appointed without due consideration to the criteria. For example, an investigative report by Prothom Alo, the largest circulating daily in Bangladesh revealed that, of the 17 judges who received appointment to the High Court Division in April 2010, nine acquired a Third class in their LLB exams, while 13 had Third Class/Division in more than one of the public exams in their lives. The report also reveals that several of the newly appointed judges were actively involved with the Bangladesh Awami Lawyers Association, a platform of pro-Awami League lawyers. It was also revealed that these judges never practiced in the Appellate Division (High Court judges are expected to have practiced for at least ten years in the Supreme Court, including the Appellate Division).<sup>38</sup>

Further, two of the judges appointed by the Awami League government in 2010, Ruhul Quddus Babu and Mohammed Khasruzzaman, face criminal charges. Ruhul Quddus Babu is one of the prime suspects in a case concerning the murder of a student activist of the University of Rajshahi<sup>39</sup> and Khasruzzaman is accused of vandalism on the Supreme Court premises (during protests by Awami League lawyers).<sup>40</sup> In fact, at the time of their appointment in April 2010, in an unprecedented move, the then Chief Justice Mohammed Fazlul Karim did not administer the oath of the two judges because of the seriousness of the charges against them.<sup>41</sup> Interestingly, no government seemed to want Mohammed Fazlul Karim in the seat of the Chief Justice and his appointment as Chief Justice had been superseded three times. Three successive regimes led by three separate governments, first the Bangladesh Nationalist Party in 2004, then the non-party Caretaker Government in 2008 and finally the Awami League government in 2009, decided to promote judges lower in the rank of seniority than Mohammed Fazlul Karim

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<sup>37</sup> Mollah, 'Independence of Judiciary in Bangladesh: An Overview', 65.

<sup>38</sup> 'Bicharok Bachai Prokriar Nitimala Mana Hoi Nai' , *The Daily Prothom Alo*, 17 April 2010.

<sup>39</sup> 'Murder Case Against Ruhul Quddus Stayed', *The Daily Star*, 18 April 2010.

<sup>40</sup> 'Controversial Two left out of Oath', *The Daily Star*, 18 April 2010.

<sup>41</sup> 'Controversial Two left out of Oath', *The Daily Star*, 18 April 2010.

to the position of Chief Justice. As a result, Mohammed Fazlul Karim was Chief Justice for only eight months before his retirement. The two judges, Ruhul Quddus Babu and Mohammed Khasruzzaman were sworn in after the retirement of Mohammed Fazlul Karim, by Chief Justice ABM Khairul Haque in November 2010.<sup>42</sup> Khairul Haque's appointment as Chief Justice itself was controversial because he was made Chief Justice by superseding two more senior judges of the Appellate Division.<sup>43</sup> The Supreme Court Bar Association President, Khandker Mahbub Hossain, termed the appointment 'politically motivated' and stated that it tarnished the image of the Supreme Court.<sup>44</sup>

The key issue of the non-separation of the Judiciary from the executive and executive heavy-handedness in the appointment process is the politicization of the justice sector. The party in power uses the magistracy and the criminal justice system to harass political opponents while absolving themselves of wrongdoing. A Judicial Independence Overview conducted by the Asian Development Bank notes that '[t]oo often changes of government result in the dismissal of criminal and corruption cases against members of the newly instated ruling party and the institutionalization of dozens of criminal and corruption cases against ministers and important bureaucrats from the last government'.<sup>45</sup> The politicization of the Judiciary and the use of the Judiciary to harass political opposition has had serious consequences for democratization. The failure of the Judiciary to act as an independent body of accountability (as with other formal constitutional institutions) has also encouraged opposition parties to digress from the formal rules and go to the streets to have their demands met.

In terms of elections, this has had a deep impact on the ability of opposition parties to participate in elections and on the extent to which candidates of the ruling party can be

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<sup>42</sup> 'CJ administers oath to four HC judges despite protests', *bdtodaynews*, 4 November 2010.

<sup>43</sup> 'Avoiding Controversy in Appointment of Chief Justice', *The Daily Star*, 10 October 2010.

<sup>44</sup> 'Avoiding Controversy in Appointment of Chief Justice', *The Daily Star*, 10 October 2010.

<sup>45</sup> Asian Development Bank, 'Judicial Independence Overview and country level summaries'.

held accountable. Judges of the High Court have frequently stated that they felt ‘embarrassed’ to hear the bail petitions of opposition leaders. When they have heard bail petitions they have often dissented giving bail to opposition leaders or have given bail but the same persons were immediately shown arrested in other cases.<sup>46</sup> For example, prior to the mayoral elections of April 2015, legal cases were filed against eleven of the thirty-six opposition candidates for the position of councilor in North Dhaka and three were arrested. Opposition leaders, regardless of their position, have found it increasingly difficult to get bail.<sup>47</sup> Further, during the 2015 mayoral election, the Dhaka Divisional Commissioner of the Election Commission rejected the nomination of Abdul Awal Mintoo, the Bangladesh Nationalist Party backed mayoral candidate for the Dhaka North City Corporation Poll. The High Court upheld the rejection on what many say are minor grounds.<sup>48</sup> Abdul Awal Mintoo’s nomination had a procedural flaw whereby one of the two people seconding his nomination did not fall under the newly demarcated Dhaka North. Most supporters of the Bangladesh Nationalist Party had expected that the High Court would allow the procedural flaw to be corrected and give directions accordingly.<sup>49</sup> Finally, the Bangladesh Nationalist Party withdrew their participation from the mayoral elections, making allegations of vote rigging. This resulted in another flawed election (as defined by Pastor<sup>50</sup>) without opposition participation in Bangladesh.<sup>51</sup>

Thus, it is clear that the patronage appointments to the Judiciary have had an impact on access to justice in Bangladesh, particularly for members of the opposition. As Laski notes, appointing judges on the basis of political allegiance may lead to justice being

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<sup>46</sup> Zahidul Islam Biswas ‘Do we have an independent Judiciary?’, *Forum*, 6 (2012).

<sup>47</sup> Anisur Rahman, ‘Bangladesh court denies bail plea of opposition leaders’, *Gulf News Asia*, May 17 2012.

<sup>48</sup> ‘Mintoo out of Mayoral Race’, *The Daily Star*, April 6 2015.

<sup>49</sup> ‘Election Commission disqualifies Mintoo’, *The Daily Star*, April 2 2015.

<sup>50</sup> Robert Pastor, ‘The Role of Electoral Administration in Democratic Transitions: Implications for Policy and Research’, *Democratization*, 6 (2007) 1-27.

<sup>51</sup> ‘All BNP-backed mayoral candidates pull out of race’, *The Daily Star*, April 28 2015.

denied. He writes: '[i]t is not necessary to suggest that there will be conscious unfairness; but it is... possible that such judges will... find themselves unconsciously biased through overappreciation of executive difficulty'.<sup>52</sup> The following is an in depth study of the proceedings in court of the writ petition filed in the form of a Public Interest Litigation by NGOs and members of the Awami League, when it was in opposition between 2001 to 2006, in order to give voters the right to certain candidates' information. The case illustrates the background conditions under which the court finally gave its decision and highlights how electoral reform from the Judiciary have been forthcoming in a statist manner. It shows that the influence of the executive of the day on the Judiciary is perhaps inappropriately high. The case study is informed by primary sources such as the original petitions, responses and appeals filed by both parties and by the decision of the High Court. It is further informed by the researcher's interviews with the lawyers representing both parties and the Secretary of the NGO responsible for filing the writ petition.

### **6.3. Case Study: Mandatory Disclosure of Candidates' Information in Bangladesh**

In May 2005, the High Court Division of the Supreme Court of Bangladesh gave an order requiring the mandatory disclosure of certain candidates' information to voters.<sup>53</sup> However, soon after the order was passed, in July 2006, an appeal was filed against the order. The High Court stayed the order and gave leave to appeal at the Appellate Division. NGOs involved in filing the writ petition were disappointed by the manner of the stay order given by the High Court and there was criticism that the Judiciary was not acting independently. Badiul Alam Majumder, Secretary of SHUJAN (the NGO that filed the writ), asks: '[w]hy did the Honourable Court become... party to the unholy alliance

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<sup>52</sup> Harold Laski, *Studies in Law and Politics*, (New Jersey: Transaction Publishers, 2009) 170.

<sup>53</sup> Abdul Momen Chowdhury and Others v Bangladesh and Others, Writ Petition No. 2561 of 2005 (Unreported: Only the final decision after Abu Safa's appeal has been reported).

against people's right to know, thereby allowing criminal elements to run in the coming parliamentary elections?'<sup>54</sup> Later, during the tenure of the Caretaker Government between 2007-2008, when electoral reform was the top agenda of the government, the court accepted SHUJAN's contention that the appellant Abu Safa was a non-existent person. SHUJAN's lawyers were able to prove that Abu Safa's lawyers on record representing were Bangladesh Nationalist Party lawyers and the appellant himself was a fictitious person.<sup>55</sup> Following these findings the High Court withdrew its order and gave a new order giving Bangladeshi voters the right to access certain information about electoral candidates.<sup>56</sup>

*Abdul Momen Chowdhury and Others v Bangladesh*<sup>57</sup> or the voters' right to information case was selected as a case study because of the momentous nature of the High Courts' decision, particularly for electoral transparency and because the hearings and judicial decisions came during the tenure of two very different political regimes, that of Bangladesh Nationalist Party (2001-2006) and that of the Caretaker Government (2007-2008) during an emergency. This allowed the researcher to compare the court's attitude towards mandatory disclosure of candidates' information and towards the lawyers of both parties. The lawyers' themselves have been seen as loyal to one or the other regime, and the court's attitude towards them seems to have shifted accordingly. This case study fits into the broader theme of the dissertation by highlighting how formal rule reform in Bangladesh has consistently depended on the needs of underlying informal institutions and patronage relationships in place. The case study also shows that when constitutional bodies such as the Judiciary and the Election Commission have failed to uphold citizens'

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<sup>54</sup> Badiul Alam Majumder, *Local Governance and Key Political Reform: Keys to Poverty Reduction*, (Dhaka: Agamee Prakashani, 2010) 328.

<sup>55</sup> Majumder, 'Local Governance and Key Political Reform', 326.

<sup>56</sup> Abu Safa v Abdul Momen Chowdhury, 2007, 36 CLC (AD) (8693).

<sup>57</sup> Abdul Momen Chowdhury and Others v Bangladesh and Others, Writ Petition No. 2561 of 2005.

interest and have behaved in a statist fashion, NGOs have taken their place in holding the executive accountable.

### *6.3.1 The Politics of the Judiciary: A Dearth in Scholarship*

According to Gibson et al, '[w]e understand little or nothing about the degree to which various judiciaries are politicized; how judges make decisions; how and whether and to what extent those decisions are implemented; how ordinary citizens influence courts, if at all; or what effect courts have on institutions and cultures'.<sup>58</sup> The literature on judicial development of rights and judicial independence in Bangladesh is very limited. The available literature has largely focused on judicial decisions on legal and technical grounds. There is hardly any literature about the backdrop against which these decisions or actions were taken. In other words, the extent to which the support of the state, the opposition, or public outcry through media intervention encouraged and contributed to the positive or negative role of the courts has been largely untouched.<sup>59</sup> Further, there is no study at all on the role of the Judiciary in promoting or preventing fair elections. These are important questions to answer, especially in the context of a study of the role of informal institutions in the conduct and outcome of formal electoral institutions and formal electoral rule making. This chapter highlights that even when the Election Commission and the Judiciary have been willing to advance voters' rights, it has been dependent on the government in power. Thus, it may be construed that the informal patronage appointments, politicization within formal institutions and excessive power in the hands of the executive determine the way in which electoral legal reform develops in Bangladesh.

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<sup>58</sup> James Gibson, Gregory Caldeira and Vanessa Baird, 'On the Legitimacy of High Courts', *American Political Science Review*, 92 (2), 343.

<sup>59</sup> Khan, 'NGOs, the Judiciary and Rights in Bangladesh: Just Another Face of Partisan Politics?', 254-274.

This case study begins with a short discussion of the Indian movement to gain voters' right to information. This is relevant because the movement in Bangladesh was seemingly influenced by the Indian initiative. Both the original NGO petitioners and later the Supreme Court relied on the Indian decisions on the matter to argue and decide in favor of similar disclosures in Bangladesh.<sup>60</sup> Additionally, the Indian experience is discussed in order to highlight the difference in the attitude of the Indian Election Commission and Judiciary in comparison to their counterpart institutions in Bangladesh. The difference highlights that formal institutions in Bangladesh are unduly influenced by the executive of the day. The Indian summary is followed by a timeline of the events leading up to the landmark voters' right to information decision in Bangladesh. The timeline is there in order to clarify the final sections of this chapter, which constitute a detailed analysis of judicial attitudes to electoral reform in Bangladesh by making a case study of the events that took place in court during the hearings (May 2005- December 2007) of the voters' right to information case.

### *6.3.2. The Indian Experience*

In India, the movement to attain voters' right to candidate information began in Bangalore in 1966. An NGO called 'Public Affairs Centre' (PAC) created a questionnaire to collect background information of candidates participating in Bangalore City Corporation Election.<sup>61</sup> Each candidate was asked whether he or she was a resident or tax payer of the ward he or she was a candidate from. In addition they were asked about their criminal records, their level of awareness regarding local problems, what they would

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<sup>60</sup> Badiul Alam Majumder, 'Nobom Jatiyo Sangshad Nirbachon 2008: Angshogrohonkari Prarthider Tathyaboli', (Dhaka: Prothom Prokashon, 2008) 18. All translations are the author's own.

<sup>61</sup> For a detailed study of PAC's role in getting disclosure of candidates' information in India see, Public Affairs Centre, 'Deepening Democracy: A Decade of Electoral Interventions by Civil Society', (Bangalore, Public Affairs Centre, 2007).

do if they were elected, their pledges, and their past achievements.<sup>62</sup> Profiles were created from the information received, with the help of volunteers and published in 'The Decan Herald'.<sup>63</sup>

Following the publication of the report, an NGO with the name Association of Democratic Reforms was created by a group of professors of 'Indian Institute of Management'.<sup>64</sup> A Public Interest Litigation was filed on behalf of this organization in the High Court of Delhi in December 1999. The Public Interest Litigation was filed to make submitting information of a candidate's criminal records, assets and liabilities compulsory for those participating in House of Representatives and State Assembly elections.<sup>65</sup> The appeal argued that only effective and transparent leadership could make freedom meaningful.<sup>66</sup> The appeal also argued that citizens have the right to fair and unbiased elections and have the right to know about those candidates who were involved in criminal activities in the past.<sup>67</sup> The appeal stated that the '[r]ight to information is not only a decoration of the law but part of primary rights related to free thinking and freedom of speech, and these rights are clearly recognized in the Constitution.'<sup>68</sup>

The Court gave its verdict on 2<sup>nd</sup> Nov 2002, stating that to keep elections fair and democratic, voters have to know the history of the candidates, especially regarding their criminal activities, assets and liabilities. The Court ordered the Indian Election

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<sup>62</sup> Public Affairs Centre, 'Deepening Democracy: A Decade of Electoral Interventions by Civil Society'.

<sup>63</sup> Public Affairs Centre, 'Deepening Democracy: A Decade of Electoral Interventions by Civil Society'.

<sup>64</sup> Association of Democratic Reforms: <<http://adrindia.org/about-adr/mission-and-vision>> (Accessed on 9 September 2015).

<sup>65</sup> Association of Democratic Reforms: <<http://www.adrindia.org/judgements-and-orders>> (Accessed on 9 September 2015).

<sup>66</sup> PUC v India, Writ Petition No. 294 of 2001 and Union of India v Association for Democratic Reforms, Civil Appeal No. 7178 of 2001.

<sup>67</sup> PUC v India, Writ Petition No. 294 of 2001 and Union of India v Association for Democratic Reforms, Civil Appeal No. 7178 of 2001.

<sup>68</sup> PUC v India, Writ Petition No. 294 of 2001 and Union of India v Association for Democratic Reforms, Civil Appeal No. 7178 of 2001.



Commission to submit the following information in the form of affidavits along with nominations: (1) information regarding candidates' past crimes, (2) detailed description of the wealth of candidates, their spouses and dependents, (3) educational qualifications of candidates and past records of their performance as Member of Parliament and legislator, and (4) all information that the Election Commission requires to judge the efficiency and qualification of the party of which the candidate is a member. While the government had appealed against the decision, the court dismissed the appeal on the basis that the right to information by voters was a part of the freedom of speech included in section 19(1)(A) of the Indian Constitution.<sup>69</sup>

It was not an easy task for the Indian Election Commission to implement the courts' order. There was resistance from the government and the Parliament and a watered down draft Bill was proposed, excluding the requirement for disclosure of candidates' educational qualifications and assets, and it was passed as a President's Order.<sup>70</sup> In September 2002, Association of Democratic Reforms and ten other NGOs challenged this Order in the Supreme Court. They stated that the Order went against Section 19(1)(A) or the freedom of speech guaranteed in the Constitution. This argument was made on the basis that Clause 33B of the Order only retained the requirement to disclose criminal records and not assets or education qualifications of the candidate, but disclosure of all these information constituted the voters' freedom of speech.<sup>71</sup> It was also claimed that a fundamental right could not be taken away through amendment of the Constitution, let alone through a law or Order.

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<sup>69</sup> PUCL v India, Writ Petition No. 490 of 2002.

<sup>70</sup> Public Affairs Centre, 'Deepening Democracy: A Decade of Electoral Interventions by Civil Society'.

<sup>71</sup> Public Affairs Centre, 'Deepening Democracy: A Decade of Electoral Interventions by Civil Society'.

On 13 March 2003, the Supreme Court declared that clause 33 of the Order was void.

The verdict stated:

*Voting at the election of a public institution or Council was a citizen's constitutional right, not a symbolic issue... to be able to vote for one's preferred candidate was part of that right. Although voting was not a primary right but a constitutional right, being able to vote for one's preferred candidate was part of freedom of expressing one's opinion.*<sup>72</sup>

Hence, it should not be possible to control, limit or thwart citizens' right to information in selecting candidates. The Court also mentioned that giving voters information is necessary for fair elections and to ensure that democracy is not turned to 'mobocracy and mockery or a farce.'<sup>73</sup>

The major difference between the Indian movement for mandatory disclosure of candidates' information and the Bangladesh movement was attitude of the formal institutions. As will become clearer as the Bangladesh case is discussed, the Bangladesh Election Commission and the High Court behaved very differently from the Indian Election Commission and the Indian courts. While the Indian institutions pursued the government to enact legal reform to enhance voters' rights, both the Election Commission and the Judiciary in Bangladesh appeared to be more subservient to the demands of the government of the day. The author puts this down to increasing interference by the executive in these institutions of accountability in Bangladesh and the resultant politicization of formal institutions.

### ***6.3.3. Abdul Momen Chowdhury and Others v Bangladesh***

**Table 7: Timeline of the Voters' Right to Information Case**

Date	Event
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<sup>72</sup> PUCL v India, Writ Petition No. 490 of 2002.

<sup>73</sup> PUCL v India, Writ Petition No. 490 of 2002.

2001 - 2006	Bangladesh Nationalist Party government in power
November 2002	CFE/SHUJAN incorporated
May 2005	Writ Petition No. 57 of 2005 filed and mandatory disclosure order received from High Court
July 2005	Writ Petition No. 5069 of 2005 filed on behalf of SHUJAN to ensure implementation of mandatory disclosure order
July 2005	Appeal against mandatory disclosure of educational qualification filed by Abu Safa
April 2006	Full bench allows leave to appeal but does not stay initial mandatory disclosure order
August 2006	Judge Joynul Abedin sworn in amongst protests by Supreme Court Bar Association
December 2006	Chamber Judge Joynul Abedin stays the entire mandatory disclosure order one day before court goes on vacation
January 2007	State of Emergency declared and New caretaker government sworn in with electoral reform as top agenda
February 2007	Court recalls their stay order on mandatory disclosure and reinstates original order
December 2007	Court dismisses Abu Safa's appeal

Similar to the Indian civil society movements, Bangladeshi NGOs have also been promoting awareness of legal rights and providing legal support through the use of rights advocacy and Public Interest Litigation for the development of civil, economic, political, and social rights.<sup>74</sup> Bangladeshi civil society was inspired by the Indian movement for voters' right to information and started its own movement following the historical verdict in *Union of India v. Association of Democratic Reforms* [(2002) 5 SCC 294] in 2002, whereby the Indian High Court stated:

*Under our Constitution, Article 19 (1)(a) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Voter's (little man- citizen's) right to know antecedents including criminal*

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<sup>74</sup> Habib Zafrullah and Habibur Rahman, 'Human Rights, Civil Society and Non-Governmental Organizations: The Nexus in Bangladesh', *Human Rights Quarterly* 24 (2002) 1012.

*past of his candidate contesting election for Member of Parliament or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law-breakers as law-makers.*<sup>75</sup>

The Indian Supreme Court upheld the High Court verdict and in *PUCL v. Union of India* (2003) 4 SSC stated:

*It is true that elections are fought by political parties, yet election would be a farce if the voters are unaware of the antecedents of candidates contesting elections. Their decision to vote either in favor of A or B candidate would be without any basis. Such election would be neither free nor fair.*<sup>76</sup>

Once the Indian High Court had given its verdict on voters' right to information, and even before the Indian Supreme Court upheld the High Court's verdict, Mojaffer Ahmad, a renowned writer in Bangladesh, set up an NGO named Citizens for Fair Election (CFE). The purpose of this institution was to provide information to the voters of Union elections,<sup>77</sup> so that they could elect 'honest, qualified candidates who would be devoted to public welfare'.<sup>78</sup> CFE filed a writ petition in the form of a Public Interest Litigation in November 2002, seeking mandatory disclosure of candidates' information in relation to (1) educational qualification of the candidates and educational certificates; (2) possible criminal cases filed against the candidates (if any); (3) any previous criminal convictions; (4) the profession of candidates; (5) source of candidates' funding; (6) previous role/work of candidates who have been Members of Parliament in the past and the extent to which they fulfilled their promises; (7) the assets and liabilities of

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<sup>75</sup> *Union of India v. Association of Democratic Reforms* [(2002) 5 SCC 294].

<sup>76</sup> *PUCL v. Union of India* (2003) 4 SSC.

<sup>77</sup> Unions are the smallest local government units in Bangladesh. There are 4550 Unions in Bangladesh.

<sup>78</sup> Majumdar, 'Nobom Jatiyo Sangshad Nirbachon 2008: Angshogrohonkari Prarthider Tathyaboli', 21.

candidates' dependents; and (8) amount and details of loans obtained from any bank or non banking financial institution as an individual/jointly or by a company of which the candidate acts as Chairman/Executive Director/Director.<sup>79</sup>

In 2003 CFE changed its name to SHUJAN in order to broaden the scope of its work. SHUJAN stands for Shushoshoner Jonno Nagorik, which translates to 'Citizens for Good Governance'.<sup>80</sup> CFE/SHUJAN has always been funded by foreign partners with its latest funding in 2013 coming from the Netherlands Embassy in Dhaka. On 2<sup>nd</sup> October 2013, the Embassy of Netherlands and SHUJAN signed a contract for the project 'Strengthening Electoral Process and Empowering Voters through Information'.<sup>81</sup> The agenda advocated by SHUJAN has always been based on principles of liberal democracy such as human rights, democracy and good governance.

One of the first tasks that CFE/SHUJAN took up after it was incorporated in 2002 was to set up dialogues with voters in different areas. They asked voters questions such as: what kind of candidates do you wish to see in union elections and what characteristics in candidates are desirable to you?. Based on the voters' opinions, a questionnaire was prepared, which was then used to collect information from candidates who were running for the post of Chairman from 55 unions.<sup>82</sup> This task was taken on by a group of volunteers who then created comparable profiles of the candidates using the data collected and posted them as posters in public places around the unions.<sup>83</sup> According to a senior member of SHUJAN, although the questionnaire used for collecting information was simple and most candidates did not answer the questionnaire properly, or gave false

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<sup>79</sup> Writ Petition No. 57 of 2005.

<sup>80</sup> SHUJAN Website: <<http://en.shujan.org/>> (Accessed on 4 September 2015).

<sup>81</sup> SHUJAN Website: <<http://bangladesh.nlembassy.org/news/2013/10/netherlands-embassy-supports-shujan.html>> (Accessed on 4 September 2015).

<sup>82</sup> Unions are the smallest local government units in Bangladesh. There are 4550 Unions in Bangladesh.

<sup>83</sup> Majumder, 'Local Governance and Political Reform', 352.

and misleading information, the project was well received by local voters and led to a lot of discussion and excitement.<sup>84</sup>

After the local election in 2002 a survey carried out by CFE/SHUJAN revealed that a substantial number of voters changed their preferred candidate after receiving background information on them. As a result, candidates whose information indicated a better track-record and history received the majority of votes, despite the nomination or backing by major political parties of questionable candidates.<sup>85</sup> This was unique because in Bangladesh the tradition has been for candidates backed by the major political parties to win.<sup>86</sup> It was further observed by CFE/SHUJAN that giving voters' access to information on the candidates also changed the attitude of the candidates. Elections were held in all the 55 unions peacefully and no act of violence occurred. The candidates who lost did not reject the results and in some states, the defeated candidates congratulated the winners and gave them garlands – a rare phenomenon in Bangladesh, where traditionally losing candidates question the fairness of the election process instead of accepting the result.<sup>87</sup> During the interview with a senior member of SHUJAN this researcher was told that the 2002 Union election experiment made it clear that providing information to the voters was absolutely essential, but voluntary collection by NGOs would not be sufficient.<sup>88</sup> Rather he expressed the view that various institutional and structural changes would have to be brought about to clean up Bangladeshi politics and administration.<sup>89</sup>

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<sup>84</sup> Interview F.

<sup>85</sup> Interview F.

<sup>86</sup> See generally, Mustafizur Rahaman, 'Parliament and Good Governance: A Bangladeshi Perspective', *Japanese Journal of Political Science*, 9 (2008) 39-62.

<sup>87</sup> Majumdar, 'Nobom Jatiya Sangsad Nirbachon 2008', 21.

<sup>88</sup> Interview F.

<sup>89</sup> Interview F.

Therefore, with a view to making information to voters permanently available and mandatory upon politicians, Advocate Abdul Momen Chowdhury (backed by SHUJAN and the Awami League (in opposition)) filed a writ petition in the High Court as a Public Interest Litigation in 2005, making the Election Commission and the Chief Election Commissioner respondents.<sup>90</sup> The Election Commission led by Mr. M. A. Sayeed did not contest this writ and the High Court ordered the Election Commission to collect information from candidates in the form of affidavit and distribute the same to all voters via the media.<sup>91</sup> Five by-elections of the eighth parliamentary elections (2001-2006 Parliament) were conducted after the High Court passed the order.<sup>92</sup> The first by-election was held in Sunamganj 3 on 20 July 2005. In the notice sent to returning officers of the Election Commission on 18 June 2005 by Justice M. A. Aziz, the Chief Election Commissioner who took office on 23 May 2005, returning officers were ordered to collect information on candidates in the form of affidavit and publish them through media channels. The notice stated:

*The Supreme Court has passed an order to provide information regarding the participating candidates on 24<sup>th</sup> May, 2005 as per the writ petition no 2561/2005 filed with the High Court Division of the Supreme Court. According to the order the candidates will submit information to the returning officer in the form of affidavit. Candidates will submit the information along with nomination letter. The returning officer will be responsible for distributing this information to the voters through media channels. Request is being made to take the necessary measures to implement the Court order.*<sup>93</sup>

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<sup>90</sup> Writ Petition no. 57 of 2005.

<sup>91</sup> Writ Petition no. 57 of 2005.

<sup>92</sup> The eighth parliamentary election was held on 1 October 2001.

<sup>93</sup> Majumdar, 'Nobom Jatiya Sangsad Nirbachon 2008: Angshogrohonkari Prarthider Tathyaboli', 17.

During the by-election in Sunamganj 3, the returning officer released a summary based on information collected by affidavit as per the direction of the Court. However, when asked for a copy of the original affidavit by SHUJAN, he declined to provide it. The same refusal happened at all the other by-elections. The Election Commission argued that, since not providing information had not been marked as a punishable offense, providing information was voluntary for the candidates, not mandatory.<sup>94</sup> Another writ petition<sup>95</sup> was filed on behalf of SHUJAN in July 2005, in order to ensure implementation of the High Court's order in *Abdul Momen Chowdhury v Bangladesh*<sup>96</sup> regarding collection of information. The court gave an order accordingly.<sup>97</sup> However, one month later, in July 2005, the court suddenly stayed the mandatory disclosure order after hearing a stay application filed by Abu Safa.<sup>98</sup>

**6.3.3.1. Appeal filed by Bangladesh Nationalist Party lawyers: Abu Safa v Abdul Momen Chowdhury**<sup>99</sup>

In the appeal filed by Abu Safa, against the mandatory disclosure order it was claimed that Abu Safa had not been able to complete his High School Diploma due to poverty. The appeal also claimed that he was self-educated and involved with many schools and colleges of his constituency, Shandeeep. According to the appeal he was a dedicated politician and social worker who had become wealthy entirely on his own efforts and was known to be a generous person. It was also claimed that he was an extremely popular, reliable and important leader and a prospective candidate of the upcoming parliamentary election. The appeal submitted that if his educational qualifications were revealed via

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<sup>94</sup> Majumdar, 'Nobom Jatiya Sangsad Nirbachon 2008: Angshogrohonkari Prarthider Tathyaboli', 17.

<sup>95</sup> Writ Petition No. 5069 of 2005.

<sup>96</sup> Writ Petition No. 2561 of 2005.

<sup>97</sup> Writ Petition No. 5069 of 2005.

<sup>98</sup> Civil Petition for Leave to Appeal No. 766 of 2005. A copy of the petition for leave to appeal was provided by Abu Safa's lawyers to the researcher. A copy is available on file with the author.

<sup>99</sup> *Abu Safa v Abdul Momen Chowdhury*, 2007, 36 CLC (AD) [8693].



affidavit, the information would act against him.<sup>100</sup> Moreover, the appeal submitted that the High Court order was discriminatory and against Article 66 of the Constitution.<sup>101</sup> According to Article 66, any person who is a citizen of Bangladesh and above twenty five years of age is qualified to be a Member of Parliament in the Jatiyo Sangshad.<sup>102</sup> Unless he or she is declared by a competent court to be of unsound mind, is an undischarged insolvent, has citizenship in a foreign state, has a criminal conviction for an offence involving moral turpitude, is an offender under The Bangladesh Collaborators (Special Tribunal) Order (1972)<sup>103</sup> or holds a position of profit in the service of the Republic of Bangladesh.<sup>104</sup> It was argued that mandatory disclosure of any other information, particularly educational qualifications, was not envisioned by Article 66 and would limit the rights of citizens to stand for elections. An argument stating that the order was inconsistent with the basic structure of democracy was also presented in the appeal. The leave to appeal did not provide any arguments as to why criminal records and asset declaration of candidates should not be mandatory.<sup>105</sup>

On 6<sup>th</sup> April 2006 (the Bangladesh Nationalist Party was still in government at this time), a three-member bench of the Appellate Division led by Chief Judge Syed J. R. Modasser Hossain accepted the 'leave to appeal' submitted on behalf of Abu Safa and ordered a hearing for the case.<sup>106</sup> The other two judges were M. M. Ruhul Amin and A. K. Chowdhury. While the three member bench accepted the leave to appeal, it rejected Abu

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<sup>100</sup> Civil Petition for Leave to Appeal No. 766 of 2005. A copy of the petition for leave to appeal was provided by the appellant's lawyer to this author. A copy is available on file with the author.

<sup>101</sup> Civil Petition for Leave to Appeal No. 766 of 2005. A copy of the petition for leave to appeal was provided by the appellant's lawyer to this author. A copy is available on file with the author.

<sup>102</sup> Article 66, Constitution of Bangladesh.

<sup>103</sup> Law enacted to try those who did not support the nationalist cause in Bangladesh or willingly supported the Pakistani army.

<sup>104</sup> Article 66, Constitution of Bangladesh.

<sup>105</sup> Civil Petition for Leave to Appeal No. 766 of 2005. A copy of the petition for leave to appeal was provided by the appellants lawyer to this author. A copy is available on file with the author.

<sup>106</sup> Civil Petition for Leave to Appeal no. 766 of 2005.

Safa's request to stay the High Court's original mandatory disclosure order, pending hearing of the case.

During interviews with both senior members of SHUJAN and lawyers representing the petitioners for mandatory disclosure of candidates' information, the researcher was told that the Abu Safa appeal was an 'unnatural' one as Abu Safa was a third party individual and not directly related to the main case. The Chief Election Commissioner was the only defendant named in the main case and usually a third party person is not allowed to file an appeal against the main case, except under very special circumstances.<sup>107</sup> Further, according to the original petitioners and their lawyers, hearing of the leave to appeal was prejudiced, because the main defendants of the case had not been notified of the appeal.<sup>108</sup> The records of the case only contained the names of the defendants and the address of the Bangladesh Supreme Court. Badiul Alam Majumder wrote: '[a]s far as we know, no notice of this case was sent to the Election Commission. Unfortunately, the Court did not question the absence of the defendants even though this was an extremely important case'.<sup>109</sup>

Further, while the full bench of the High Court had not accepted Abu Safa's request to stay the High Court Order on 6 April 2006 (but only gave leave to appeal), a few months later, on the day that the Court went on winter vacation, on 19 December 2006, Justice Joynul Abedin suddenly stayed the High Court's mandatory disclosure order in the privacy of his Chamber in the absence of the defendants (original petitioners).<sup>110</sup> The fact that it was Justice Abedin who put a stay on the mandatory disclosure order is interesting, because Supreme Court lawyers had protested his appointment on the

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<sup>107</sup> Interview F and Interview N.

<sup>108</sup> Interview N.

<sup>109</sup> Majumdar, 'Nobom Jatiya Sangsad Nirbachon 2008: Angshogrohonkari Prarthider Tathyaboli', 15.

<sup>110</sup> 'Highest Judiciary Victim of a Blatant Fraud?', *The Daily Star*, 5 January 2007.

grounds that it was politicized.<sup>111</sup> Justice Abedin had been sworn in on 24 August 2006, amongst protests by the Supreme Court Bar Association on the basis that the appointment was given superseding three judges and that the appointment was politically motivated.<sup>112</sup>

The stay order given by Justice Abedin was unusual on several counts. Firstly, Justice Abedin stayed the High Court's order during the winter vacation, even though the Chief Justice and three other Appellate Division judges had originally refused to stay the High Court's order. Secondly, Abu Safa's lawyers appealed for the stay just before winter vacation started instead of bringing it up while session was still in progress at the Supreme Court. Thirdly, Justice Abedin seemed to have overlooked the fact that the Chief Election Commissioner had been the only defendant in the original writ, but was not named as an appellant in the appeal against the High Court's order. Finally, according to senior member of SHUJAN, another unusual thing about the stay order was that even though Abu Safa had only submitted reservations regarding his educational qualification, Justice Abedin passed a stay on the whole order and made the stay applicable to all electoral candidates instead of just for Abu Safa. The interviewee commented that '[t]he order reached the Election Commission within [a] few hours after it was passed and the Commission implemented it with surprising speed. This makes it clear that some influential party was involved.'<sup>113</sup> (Delays in the formal decree and distribution of court orders are the expected norm in Bangladesh.<sup>114</sup>). Moreover, Omar Sadat, the lawyer who prayed for the stay, was a candidate for parliamentary elections nominated by Bangladesh Nationalist Party for Jessore 4, the party in power at the time

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<sup>111</sup> 'SCBA protests Justice Joynul', *The New Nation*, 24 August 2006.

<sup>112</sup> 'SCBA protests Justice Joynul', *The New Nation*, 24 August 2006.

<sup>113</sup> Interview F.

<sup>114</sup> See, Mizanur Rahman Chowdhury, 'A Study on Delay in the Disposal of Civil Litigation: Bangladesh Perspective', *The International Journal of Social Sciences*, 14(2004) 27-35.

(2005).<sup>115</sup> Omar Sadat's position within the Bangladesh Nationalist Party makes it probable that the appeal was filed on behalf of the government.

Around the same time as the stay order was given, Bangladesh was going through unprecedented political violence because of opposition demonstrations and strikes.<sup>116</sup> Soon afterwards, in January 2007, after declaring a state of emergency, the President dissolved the sitting Caretaker Government and a new Caretaker Government headed by Fakhruddin Ahmed, with an agenda to reform the electoral framework, took over.<sup>117</sup> The Caretaker Government implemented major electoral reform based on principles of good governance. During the tenure of the Caretaker Government, the High Court dismissed Abu Safa's appeal on 11 December 2007. It is important to note here that in December 2006, while the Bangladesh Nationalist Party was in government, the High Court was willing to stay the entire mandatory disclosure order without notifying the original petitioners, in the privacy of Justice Abedin's chamber on the day the court was going on vacation. However, once the Caretaker Government was in power with an agenda of electoral reform, the court was willing to recall its order (in an unprecedented manner as will be revealed below) and dismiss Abu Safa's appeal. Thus, while the final judgment on voters' right to information given by the High Court was positive, it may have only been so because the government of the day was backing such a judgment.

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<sup>115</sup> Interview Y.

<sup>116</sup> These protests were aimed at the election to be held in January 2007. Please see Chapter Four for more details. Also, see generally, Masudul Haque, 'Emergency Powers and Caretaker Government in Bangladesh', *Journal of the Australasian Law Teachers Association*, 2008.

<sup>117</sup> Abu Tayeb Rafiqur Rahman, *Bangladesh Election 2008 and Beyond* (Dhaka: University Press Limited, 2008) 1-3.

### 6.3.3.2. Emergency and the Politics of the Judiciary

The state of emergency in Bangladesh between 2007-2008 under the Caretaker Government is said to have put the Judiciary under serious strain.<sup>118</sup> Ridwanul Hoque writes that the emergency, 'put the country's Judiciary under certain challenges with a far-reaching bearing on judicial statesmanship... recent Bangladeshi judicial decisions show... its Appellate Division either remained silent or paid undue deference to the executive'.<sup>119</sup> Hoque goes on to say that 'the Bangladeshi Judiciary's largely ambivalent and almost escapist position during Emergency has led it to suffer a serious crisis of public confidence which is likely to generate negative implications of its constitutional agency in achieving and improving justice and constitutionalism'.<sup>120</sup> In trying to answer why the Judiciary played an executive-minded role during the 2007-2008 emergency, there are those who allege that the Caretaker Government regime compelled judges 'not to speak' by creating an atmosphere of fear and humiliation for the top judges by posing threats of bringing corruption charges against Supreme Court judges.<sup>121</sup> Given these allegations of excessive executive influence on the Judiciary during the Caretaker Government's regime in 2007-2008, the court's actions in relation to the mandatory disclosure of candidates' information case may indeed be evidence that the executive has undue influence on the Judiciary and that the Bangladeshi Judiciary has been playing a role that is not mandated by the Constitution by being overly statist. Thus, informal patterns of behavior have resulted in changes to the outcome of formal institutions and has had an impact on formal electoral reform.

The researcher was able to interview lawyers representing both Abdul Momen Chowdhury and Abu Safa, and hear the opinions of both sides. During these interviews

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<sup>118</sup>Ridwanul Hoque, 'The Recent Emergency and the Politics of the Judiciary in Bangladesh', *NUJS Law Review*, 2(2009) 183-203.

<sup>119</sup> Hoque, 'The Recent Emergency and the Politics of the Judiciary in Bangladesh', 183.

<sup>120</sup> Hoque, 'The Recent Emergency and the Politics of the Judiciary in Bangladesh', 185.

<sup>121</sup> Hoque, 'The Recent Emergency and the Politics of the Judiciary in Bangladesh', 202.

she was told about ‘drama’ that took place in the courtroom and how the manner of the proceedings of this case was highly unusual for the Supreme Court both during the Bangladesh Nationalist Party regime (as described above in Section 6.3.3.1.) and during the Emergency Caretaker Government period.

#### **6.3.3.3. Proceedings on 20 February 2007 and ‘Drama’ at the High Court**

Soon after Justice Abedin had stayed the mandatory disclosure order in December 2006, SHUJAN and other civil society partners such as the Prothom Alo (Bangladesh’s largest circulating daily) undertook an investigation. The author was informed by a senior member of SHUJAN, that in his submissions, Abu Safa claimed that he had purchased a nomination form for the 22<sup>nd</sup> January 2007 election. However, according to the interviewee no evidence of Abu Safa having collected a nomination form from the office of the returning officer of Chittagong-3 could be found.<sup>122</sup> Further investigation by SHUJAN revealed that Abu Safa was not even listed as a voter of Chittagong 3 zone (Shandeeep) and even after the stay was given, he did not submit a nomination letter.<sup>123</sup> SHUJAN and Prothom Alo also sent investigators to Shandeeep. According to one of the lawyers for the original petitioners:

*So we (SHUJAN, its lawyers and the media) did something quite exceptional. Some press people and people from SHUJAN went and did an extraordinary fact-finding survey. They found out from Abu Safa’s family... he had basically lost all links with Shandeeep. They went to the High school and they said no he hasn’t been here, they went to the District Commissioner and everyone said no he is nowhere to be seen or heard and he has not built any colleges or schools as alleged in his petition. So all this was video taped.<sup>124</sup>*

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<sup>122</sup> Interview F.

<sup>123</sup> Interview F.

<sup>124</sup> Interview N.

Because SHUJAN had found out that Abu Safa was an imposter from the local people of Shandeeep, they decided to try to find the man. SHUJAN in collaboration with Prothom Alo<sup>125</sup> could not find him anywhere around Dhaka, Narayanganj or Gazipur area. Prothom Alo published an investigatory report about Abu Safa. The headline of the report was: ‘Appeal of Abu Safa in the Supreme Court – his relatives at Shandeeep found it immensely funny’.<sup>126</sup> The headline by Prothom Alo, along with SHUJAN’s efforts to publicise the case of Abu Safa created a public outcry. As a result, the majority of Abu Safa’s counsels including Ajmalul Hossain QC and Mahabubur Rahman dropped the case and Barrister Omar Sadat, a Bangladesh Nationalist Party candidate, remained the sole lawyer for Abu Safa.

After Justice Abedin’s stay on the mandatory disclosure order was given on 19 December 2006, the next hearing took place on 20 February 2007 (when state of emergency had been declared and the Caretaker Government was in power). During an interview with one of the lawyers representing the original petitioners the researcher was given an account of what happened during the proceedings of 20 February 2007. This was an extraordinary story of how the High Court withdrew its order in an unprecedented manner following ‘drama’ at the court. The following is the lawyer’s account:

*I went to the bench and basically said look, you have been defrauded. This is complete fraud on the court; because we have evidence here he (Abu Safa) has not been in Shandeeep. He left five years ago and we have all this on video so please come into the chamber and see it for yourselves. We submitted all this with affidavit and said we have got the supporting video. I said nothing about the merits of the case. I also had a good set of arguments on the merits, but on that*

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<sup>125</sup> Bangladesh’s largest circulating daily.

<sup>126</sup> *Prothom Alo*, 24 Dec 2006, Dhaka.

*morning I only stood up and said that this writ petition should be summarily rejected. So they said alright, we will consider it.*

*They came back from the chamber and said no your application to remove the stay is rejected. But then I said no, because I have not addressed you on the merits. I have only made preliminary submissions. If you reject my preliminary submission I have much to say. But the court then said, sorry but we have already passed our order that this is rejected. I said, but you can't pass the order while I'm in the middle of my submission. And they said but you don't seem to understand that we have already passed the order. I said you don't have the authority to pass an order until I have completed my submissions. I said, Supreme Court can do anything, do or undo, make amendments, but you cannot in mid-submission tell me I have been rejected. And I am not leaving here until I have completed my submission. Give me ten minutes to say what I have to say and then you reject it. So then I said I'm not going from here, I am staying here. You send for BDR<sup>127</sup>, you send for armed police but they are not taking me out of here alive or I'm not going to walk out of here, I'm sitting here until you give me a hearing.*

*So this created a bit of a situation. They walked inside, other lawyers gathered there. The Attorney General came. The President of the Bar Association came. But I said I meant what I said; I'm not going to go out of here alive. So after an hour of negotiation with the President of the Bar and so on the court said alright, that they would recall their order. So they recalled the order, they heard me, and then they allowed my petition and dismissed the leave petition of Abu Safa.<sup>128</sup>*

The High court delivered its judgment on 11 December 2007, and stated:

*In the background of the afore state of the matter we are of the view that the appeal being Civil Appeal No 57 of 2006 was filed by non – genuine person upon using imaginary name of a*

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<sup>127</sup> Border Guards Bangladesh.

<sup>128</sup> Interview N.



*person and that upon using fabricated papers. Such manner of filing a case is highly depreciable one and as such (is) strongly disapproved by the Court. The advocate-on record is cautioned as well as warned from repeating such kind of thing in the future.*

*Since the appeal has been filed by fabricating paper which (is) highly condemnable in law and consequently there being no appeal in the eye of law we are not entering into the merit of the appeal.*

*'The appeal is dismissed since the appeal was filed by using fabricated and non genuine papers.'*<sup>129</sup>

Abdul Momen Chowdhury's lawyer's account of the proceedings of 20 February 2007 shows that the courts are not immune from influence. There can be no denying that the public outcry following the revelation of Abu Safa's false identity, the position of the Caretaker Government vis-a-vis electoral reform, the petitioners lawyer's strong position on the day of the hearings backed by support from Awami League lawyers and the presence of the Attorney General and the President of the Bar Association had a role to play in the court's decision to withdraw its order.

## **6.4. Conclusion**

Influence over the Judiciary by the executive in the form of recruitment, control over the budget, salary of judges and presidential discretion in the appointment of High Court judges has led to a situation where the executive has undue influence. A particular source of politicization within the judiciary has been brought on by the patronage appointment of additional judges by the executive with a partisan and politicized agenda. In *Abu Safa v Abdul Momen Chowdhury*,<sup>130</sup> the court went beyond the prayer of the petitioner when the Bangladesh Nationalist Party was in power and gave a full stay on the disclosure of

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<sup>129</sup> *Abu Safa v Abdul Momen Chowdhury*, 2007, 36 CLC (AD) [8693].

<sup>130</sup> *Abu Safa v Abdul Momen Chowdhury*, 2007, 36 CLC (AD) [8693].

candidates' information for all candidates. However, the court was willing to overturn the stay and dismissed Abu Safa's appeal in a very dramatic manner during the tenure of the army-backed Caretaker Government, which had an agenda for electoral reform. The manner in which the court gave these two different decisions in the same case is an indication of the influence of the executive on the Judiciary. It also highlights that judicial development of electoral laws have been statist.

This brings this thesis to the reforms put into place by the army backed Caretaker Government of 2007-2008 and the crisis of political party candidate nominations in Bangladesh. The next chapter looks into the formal reforms to political parties' candidate nomination process and uses the 2011 Narayanganj City Corporation Polls as a case study in order to highlight the futility of formal institutional reform in the face of conflict with informal institutions. While the judiciary might have taken into account the need of the executive of the day in giving its decisions on mandatory disclosure, the triumph of informal rules in political party decisions plays out more obviously.

## **Chapter 7 – Electoral Reforms and their Success/Failure in the Context of Clientelistic Politics: The Case of Candidate Nomination Laws**

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### **7.1. Introduction**

According to Pippa Norris, while countries frequently make minor changes to the electoral legal and regulatory framework, such as reforms to campaign finance laws or revisions to constituency delimitation, it is rare to see significant reform to electoral systems in the form of how votes translate to seats. This is because, 'in "normal politics" the rules of the game are taken for granted, and politicians merely dispute the spoils'<sup>1</sup> and once a system is established, incumbent parties interests become entrenched, allowing them to benefit from the status quo. Electoral reform is important when a political system has become ineffective and is seen as a way to 'complete a process of democratization which would put an end to deep-rooted failures in the political system'.<sup>2</sup> While the authors of the special issue on the politics of electoral reform published by the International Political Science Review (IPSR) focused on electoral reform in electoral systems and constitutional change, the experience in Bangladesh has shown that the 'politics' of electoral reform has remained similar even with regards to non-electoral system or non-constitutional reforms to election laws. Political parties have favoured the status quo since the birth of the Constitution and significant reforms to the Representation of the People's Order 1972 could only be brought about under the auspices of an army-backed Non-Party Caretaker Government (as discussed in the previous chapters) while the country was under emergency rule in 2007. The purpose of this chapter is to identify the reforms introduced in 2008. It then goes on to attempt to analyse the extent to which these reforms have been accepted by political parties by

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<sup>1</sup> Pippa Norris, 'The Politics of Electoral Reform', *International Political Science Review* 16 (1995), 3.

<sup>2</sup> Norris, 'The Politics of Electoral Reform', 7.

making a case study of candidate nominations in Bangladesh. The researcher attempts to show the role of informal institutions in undermining formal electoral reform by making a case study of the candidate nomination process of the Bangladesh Nationalist Party and the Awami League. By highlighting laws relating to Candidate Selection Process as introduced by the Caretaker Government in 2008 and analysing to what extent these reforms are being implemented by political parties since return to democracy in 2009, the researcher attempts to understand the conflict between formal and informal rules. The researcher concludes that in the context of the patron-client networks that structure political parties in Bangladesh, these formal laws remain only on paper and have little impact in genuinely democratizing the candidate nomination process.

The IPSR special issue studies driving factors behind electoral reform in different countries and under different systems ranging from Israel, to New Zealand to Japan and many more. The authors find three long-term conditions that are critical for reform and a number of short-term catalysts. The long-term conditions are:<sup>3</sup>

- i. Significant changes to the established party system, including the fragmentation in one party systems, weakening party loyalties and the rise of minor parties,
- ii. A series of political scandals and/or government failures which rocks public confidence in the political system,
- and,
- iii. Constitutional provisions for referendums, which allow the possibility to break ingrained party interests.

On the other hand, the study shows that short-term catalysts for electoral reform can be wide ranging and depend on the particular circumstances of the country.<sup>4</sup> Case studies

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<sup>3</sup> Norris, 'The Politics of Electoral Reform', 7.

<sup>4</sup> Norris, 'The Politics of Electoral Reform', 7.

show these can be for numerous reasons, including the policies of political parties and their factions, legislative behavior in government coalition and extra-parliamentary reform movements involving pressure groups and the media.<sup>5</sup>

In this chapter the researcher studies the driving force behind major electoral reform in Bangladesh. The researcher explains that the electoral scandals during the tenure of the Bangladesh Nationalist Party between 2001- 2006 eroded ‘public confidence in the political system’<sup>6</sup> and became the catalyst in Bangladesh for electoral reform. The chapter then sets out the ‘good governance’ electoral reforms introduced in 2008 and studies the effectiveness of these reforms by showing how candidate nomination laws are disregarded by political parties by making a case study of the 2011 Narayanganj City Corporation Polls. The chapter concludes that the 2008 electoral reforms had little effect on the nature of elections in Bangladesh, because they are not compatible with the informal rules on the basis of which politics and voting take place.

## **7.2. History of Electoral Reform**

According to Sakhawat Hussain, the past Commissioner of the Bangladesh Election Commission, under whose watch major electoral reform took place, ‘[e]lectoral reform is a continuous process. It is a dynamic process that requires fore-thinking, consultation and analysis, past experiences gathered after every election and research to the good practices and system of the regional countries to formulate reform plan or initiative.’<sup>7</sup> He goes on to write that since the first post-independence election of 1973, no such reform had taken place either to the law, voter registration system or to the structure of the Election Commission in Bangladesh. According to Hussain ‘no record indicates that Election Commission had established a formal methodology for initiating any kind of

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<sup>5</sup> Norris, ‘The Politics of Electoral Reform’, 7.

<sup>6</sup> Norris, ‘The Politics of Electoral Reform’, 7.

<sup>7</sup> Sakhawat Hussain, *Electoral Reform in Bangladesh 1972-2008*, (Dhaka: Palok Publishers, 2012) 118.

reform.<sup>8</sup> In fact, until 2007, the only serious change to the electoral framework in Bangladesh took place in 1996, through the 13<sup>th</sup> amendment to the Constitution and the insertion of the provision of the Caretaker Government as discussed in Chapter Five above. This is in addition to some minor efforts, which had been made to amend the Representation of the Peoples Order 1972.

The Representation of the People Order was enacted on 26 December 1972, in pursuance of the Fourth Schedule of the Bangladesh Constitution and it is the main law governing elections in Bangladesh. Bangladesh was governed by authoritarian rulers from 1975 until 1991 and elections during this period is generally accepted to be rigged and served as a process to legitimize authoritarian regimes,<sup>9</sup> as has been discussed in the introductory chapter of this dissertation. No genuine electoral reform took place during this period, nor was the Election Commission effective or independent. In fact, under Ershad's rule on 27 May 1982, the Election Commission Secretariat was brought under the President's Secretariat rather than under the Election Commission, further weakening the Election Commission (discussed in Section 4.2.2.). However, since Bangladesh's return to democratic governance in 1991, there have been some efforts to bring about changes to the Representation of the Peoples Order (1972). Although in 1996, the focus of civil society had been on constitutional amendment and a provision of a neutral Caretaker Government in order to supervise elections, by 2001 civil society had begun to demand non-constitutional electoral reform. Sakhawat Hussain writes: 'it was not before 2001 that Election Commission felt pressure from the public and the civil society to take some reform measures'.<sup>10</sup>

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<sup>8</sup> Hussain, 'Electoral Reform in Bangladesh 1972-2008', 118.

<sup>9</sup> Gyasuddin Molla, 'Democratic Institution Building Process in Bangladesh: 'Model Building'- A Failure?, 'Capacity Development'- A Sine Qua Non?', Department of Political Science, University of Dhaka (Unpublished).

<sup>10</sup> Hussain, 'Electoral Reform in Bangladesh 1972-2008', 118.

In 2001, upon demand from the public and civil society, the Election Commission suggested that Articles 91A, 91B, 91C, 91D and 91E be inserted in the Representation of the Peoples Order (1972). Article 91A was a major reform in relation to the registration of political parties, 91B provided for contempt against the Election Commission, 91C pertained to election observation, 91D allowed the Election Commission to cancel candidature in the event of gross violation of election rules and 91E allowed the Election Commission to summon witnesses during any enquiry connected with elections. However, the suggested Article 91B and 91D were withdrawn under political pressure and the other provisions were softened. With the withdrawal of the provision allowing the Election Commission to cancel candidature in the event of gross violation of election laws, a large part of the effect of the reforms were lost. Article 91A was also softened under political pressure and only required political parties to maintain a formal relationship with the Election Commission as opposed to requiring registration. Few of the suggested reforms were passed in whole by Parliament, and the final outcome of the 2001 amendments to the Representation of the People's Order was much watered down.<sup>11</sup>

The reason behind the failure of the 2001 reform attempt was that no political party supported the suggested reforms. Political parties found that both the suggested 91A (mandatory registration of political parties) and 91D (candidacy cancellation) ran against their interests. Both the Bangladesh Nationalist Party and the Awami League threatened to boycott the upcoming election if Article 91A was not made optional. Both major parties opined that mandatory registration would force them to be regulated by a body (Election Commission), which did not have a mandate beyond election and which suffered from low public approval. Further, because of the perception that the Election

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<sup>11</sup> Article 91, Representation of the People's Order 1972.

Commission may be partisan, all the political parties felt that Article 91D may be used by the Election Commission to harass particular parties and candidates.<sup>12</sup>

### **7.3. The 2007-2008 Electoral Reforms**

Leading up to the elections, which were to be held in January 2007, Bangladesh sank into months of street violence and protests by the opposition and threats of electoral boycott as discussed in Chapter Four. Hagerty writes that ‘Bangladeshis will long remember 2007 as the year that their fledgling democracy was interrupted’.<sup>13</sup> On 27 October 2006 Parliament was dissolved and as per the Constitution, following the dissolution of the Parliament, the incumbent government stood down and the President assumed the responsibilities of governing the country by appointing a Caretaker Government, which would in turn hold a free and fair election within three months. According to the Constitution and previous experience in Bangladesh, the last retiring Chief Justice would usually be appointed as the Chief Advisor of the Caretaker Government. However, because of controversy that arose as a result of the 14<sup>th</sup> amendment (as discussed in Section 5.4.) the then immediate past Chief Justice K.M. Hasan did not accept the post. Following his refusal, the President appointed himself as Chief Advisor without exhausting all other options provided in the Constitution<sup>14</sup> (please see chapter five for more details) and appointed ten advisors. The opposition parties, led by the Awami League accused the Bangladesh Nationalist Party and the President of stacking the Caretaker Government and the Bangladesh Election Commission with its supporters as detailed in chapters four and five.

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<sup>12</sup> Hussain ‘Electoral Reform in Bangladesh 1972-2008’, 120.

<sup>13</sup> Devin Hagerty, ‘Bangladesh in 2007: Democracy Interrupted: Political and Environmental Challenges Ahead’, *Asian Survey*, 48 (2008) 177.

<sup>14</sup> Abu Tayeb Rafiqur Rahman, ‘Bangladesh Election 2008 and Beyond: Reforming Institutions and Political Culture for a Sustainable Democracy’ (Dhaka: University Press Limited, 2008) 2.



The main demand from opposition parties included the appointment of non-partisan Election Commissioners, correction of the faulty voter list which contained 12 million fake or duplicate names (these events are discussed in detail in Section 4.3. above), removal of partisan civil and police administration officials and the appointment of the Chief Advisor to the Caretaker Government.<sup>15</sup> Following weeks of some of the worst violence in Bangladesh's democratic era the President declared emergency on 11 January 2007.<sup>16</sup> The state of emergency suspended all political activity across the country and the elections were postponed. The sitting Caretaker Government of 2006 was replaced by a nonpartisan Caretaker Government drawn primarily from the private sector. The army, led by its then Chief of Staff General Moeen U. Ahmed gave its full backing to the Caretaker Government. Hagerty writes: '[m]ost Bangladeshis initially appeared to support the declaration of emergency, believing that it would prevent sharply escalating instability and perhaps even civil war. However, with the passage of time, concerns have grown about the army's long-term political intentions and the sincerity of its pledges to restore Bangladesh's democracy.'<sup>17</sup>

The Caretaker Government took on two major tasks during its tenure, firstly an anti-corruption drive (which was eventually though to be unsuccessful)<sup>18</sup> and secondly major electoral reforms in partnership with the Election Commission. As a result of the ban on political activity and arrest of the top leadership of the two major political parties on charges of corruption, the Election Commission was able to push through reforms as

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<sup>15</sup> Rahman, 'Bangladesh Election 2008 and Beyond: Reforming Institutions and Political Culture for a Sustainable Democracy', (Preface).

<sup>16</sup> Hagerty, 'Bangladesh in 2007: Democracy Interrupted: Political and Environmental Challenges Ahead', 177.

<sup>17</sup> Hagerty, 'Bangladesh in 2007: Democracy Interrupted: Political and Environmental Challenges Ahead', 177.

<sup>18</sup> See generally, Human Rights Watch- Bangladesh. <<http://www.hrw.org/en/node/79296>> (Accessed on 5 September 2015). It is not necessary for the purpose of this dissertation, which focuses on electoral institutions, to discuss the Caretaker Government's Anti-Corruption drive, which constituted of attempts to investigate large-scale corruption in relation to government contracts.

had never been possible before because of resistance from political parties. During an interview with a past Commissioner of the Election Commission this author was told:

*Previous Election Commissions could not make changes because of political interference by all the political parties. So any substantial change they wanted to bring, the political parties, whether in power or opposition, they resisted. For example the requirement for political party registration could not be pushed through because all the political parties opposed it. They never wanted to be registered so the previous Election Commissions could not do it. And then empowering the Election Commission with a lot of laws. Such as 91E – which says that if somebody has violated major electoral rule then Election Commission has the power to cancel candidature. And that could not be done before because the political parties object... And also this was an ordinance of the Caretaker Government so we didn't have to go to Parliament to have this passed. And we were able to implement all these changes.<sup>19</sup>*

The Election Commission created a draft law that included rules on money laundering, disclosure of candidates' information, qualifications for candidacy, the use of muscle power during elections, the prevention of the use of religion in election campaigns, democratic practices within and amongst political parties, increase in the number of women's reserved seats, compulsory registration of political parties, provisions for a no vote option on the ballot, and the behavior of political parties and electoral candidates. The draft was accepted by the President and passed as an amendment to the Representation of the Peoples Order (1972) as a Presidential Order. The National Election on 29 December 2008 took place under the Caretaker Government on the basis of this Order.

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<sup>19</sup> Interview A10.

The Order was approved in the first session of the 9<sup>th</sup> National Parliament after the Awami League government came back to power in 2008.<sup>20</sup> However some important provisions including the provision of an option of no vote got excluded from the Order. Also, the amendment legislated by the President during the tenure of the Caretaker government included a provision to finalize candidate nominations based on decisions of a Nomination Board, constituting of grassroots level members of political parties. This was changed after return to parliamentary government and only a provision stating that nominations would be given after taking into consideration recommendations made by grassroots members was included in clause 90B(1)(b)(iv) of the Representation of the Peoples (Amendment) Order Act 2009. This meant that giving nominations based on recommendations made by grassroots members was no longer compulsory. The case study discussed in this chapter will highlight the extent to which political parties have utilized this weakness in the law in order to accommodate informal institutions and clientelistic politics.

While the reforms introduced by the 2007-2012 Election Commission have generally been hailed as an upgrade to the electoral legal framework of Bangladesh, these reforms had very little impact in practice because of the clientelistic context of Bangladesh, where formal laws that are not compatible with the informal laws become marginalized. Indeed, as previous chapters have illustrated, changes to constitutional design by removing the Caretaker Government, have led opposition parties to refrain from participating in elections – so reforms to election procedures have become nullified/unimportant in any case.

The following is a discussion of the law reforms that were introduced by the Caretaker Government of 2007-2008. This will be followed by a case study based on the

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<sup>20</sup> Representation of the People (Amendment) Order Act 2009.

nomination of the Awami League candidate for mayoral elections in the Narayanganj City Corporation Polls of 2011 in order to illustrate how formal legal reforms have made little difference to the internal democracy of political parties, which had been the aim of reforms introduced to political party nomination rules.

### ***7.3.1. Registration of Political Parties***

In 2008, for the first time, political parties contesting in the election had to be registered. Article 90B(a) of the Representation of the People's Order (now Representation of the Peoples Act (2009)) defines the criteria for eligibility for registration as a political party as a party, which fulfills at least one of the following conditions:

- i. Secured at least one seat with its electoral symbol in any parliamentary election held since the independence of Bangladesh;
- ii. Secured five percent of total votes cast in the constituencies in which its candidates took part in any of the aforesaid parliamentary elections;
- or,
- iii. Established a functional central office, with a central committee and district offices in at least ten administrative districts and offices in at least fifty Upazilas or Metropolitan Thanas.

In 2008, a total of 107 parties applied for registration. The Election Commission registered only 39 of them. In 2001, 55 political parties had contested for elections. The Election Commission informed the Commonwealth Observer Group that most of those rejected were relatively unknown smaller parties, which upon investigation, were found not to have the District and Upazila-level offices as claimed.<sup>21</sup>

In addition to the criteria identified in 90B(a), 90B(b) stipulates that parties shall have

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<sup>21</sup> Report of the Commonwealth Observer Group, Bangladesh Parliamentary Elections, 2008, Commonwealth Secretariat, 9.

specific provisions in their constitutions to:

- i. Elect the members of the committees at all levels, including members of the central committee;
- ii. Fix the goal of reserving at least 33% of all committee positions for women, including the central committee and successfully achieving this goal by the year 2020;
- iii. Prohibit formation of any organisation or body as its affiliated or associated body consisting of the teachers or students of any educational institution or the employees or labourers of any financial, commercial or industrial institution; and,
- iv. Finalize nomination of candidates by central parliamentary board of the party from the panels prepared by members of the Ward, Union, Thana, Upazila or District committee as the case may be of the concerned constituency.

In line with these requirements, the Awami League held its 19<sup>th</sup> National Council on December 29, 2012. The 6000 councilors elected a treasurer, 13 presidium members (the highest policy making body of the party) and 31 secretaries, including three joint general secretaries and seven organizing secretaries. However, most Bangladeshi newspapers were critical of the council and stated that it was more a formality and the final decision still remained in the hands of the Prime Minister, Sheikh Hasina.<sup>22</sup> The main opposition, Bangladesh Nationalist Party, was scheduled to hold its 6<sup>th</sup> National Council in March of 2013.<sup>23</sup> By March 2015 the Bangladesh Nationalist Party National Council still had not met, highlighting how little importance political parties have given to the latest electoral reforms.

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<sup>22</sup> Shakhawat Liton and Jahid Hsan Tusher, 'AL National Council Today: Changes Unlikely in Top leadership', *The Daily Star*, 29 December 2012.

<sup>23</sup> 'BNP Council in March', *The Daily Star*, 28 January 2013.

Further, according to Article 90C of the Representation of the Peoples Order (1972), a party would not qualify for registration if:

- i. The objectives laid down in its constitution are contrary to the Constitution of Bangladesh;
- ii. Any discrimination regarding religion, race, caste, language or sex is apparent in its constitution;
- iii. By name, flag, symbol or any other activity it threatens to destroy communal harmony or leads the country to territorial disintegration;
- or,
- iv. There is any provision in its constitution for the establishment or operation of any office, branch or committee outside the territory of Bangladesh.

In accordance with Article 90C, on 1 August 2013, the High Court declared the Jamaat-e-Islami's registration with the Election Commission illegal.<sup>24</sup> However, neither the Awami League government nor the Election Commission have yet complied with this judgment, possibly because of the political implications of doing so.<sup>25</sup>

### ***7.3.2. Voter Registration and Voter Registers***

The Voter List was severely criticised as inflated with false names in 2006 (please see Section 4.3.), with accusations that it was made up of multiple entries, names of dead persons and fake names. At that time, political parties made it a key demand that the list needed to be redrawn. Following the State of Emergency it was decided by the Caretaker Government to prepare a fresh Voter List. The Caretaker Government drew up the fresh Voter List based on information collected by going door to door between August 2007

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<sup>24</sup> 'Jamaat Registration Illegal: HC', *The Daily Star*, 1 August 2013.

<sup>25</sup> Political implications for the Awami League, known as a secular party, would mean it might alienate the Muslim vote. For an analysis please see, Arshi Saleem Hashmi, 'Bangladesh Ban on Religion Based Politics: Reviving the Secular Character of the Constitution', *Spotlight on Regional Affairs*, Institute of Regional Studies, February 2011, 7.

and July 2008. The Army had strong participation in the exercise through providing logistical and technical support, which was managed by the Election Commission by recruiting local data entry personnel. Prospective voters visited registration centers and a digital photo was taken together with relevant details. It was also decided at this time to produce a national ID Card using the same information plus a thumbprint for unique identification purposes.<sup>26</sup> Political parties were able to purchase copies of the Voter list for printing, but the copies would not include photographs.<sup>27</sup>

In 2008, the fresh Voter List constituted of 51% of female voters and 49% male voters. This list excluded around 13 million names compared to the previous list prepared during the 2001-2006 Bangladesh Nationalist Party regime.<sup>28</sup>

However, the 2008 Voter List only included persons turning 18 prior to 1 January 2008 for an election in that year. As the election was held on 29 December almost every person turning 18 during 2008 (estimated at some 3 million persons) was excluded from the list and therefore was not able to vote. Thus, there was a major omission of young voters, which could have been addressed by either registering 17 year olds, who could have been added as and when they turn 18, or by use of a supplementary list.<sup>29</sup>

### *7.3.3. Democratic electoral campaigns*

Rules concerning the conduct of elections were strengthened during the tenure of the army backed Caretaker Government. The Election Commission was given more

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<sup>26</sup> On 27 March 2007 the High Court gave a judgment ordering the Election Commission to provide voter ID cards in *Kazi Mamnur Rashid v Bangladesh* 16 BLT(HCD) 2008. See also, Peter Eicher, Zaharul Alam and Jeremy Eckstein, 'Elections in Bangladesh 2006-2009: Turning Failure into Success', United Nations Development Program Bangladesh, 2010, 14.

<sup>27</sup> Report of the Commonwealth Observer Group, Bangladesh Parliamentary Elections, 2008, Commonwealth Secretariat, 9.

<sup>28</sup> Report of the Commonwealth Observer Group, Bangladesh Parliamentary Elections, 2008, Commonwealth Secretariat, 9.

<sup>29</sup> Report of the Commonwealth Observer Group, Bangladesh Parliamentary Elections, 2008, Commonwealth Secretariat, 13.

authority to take strict actions, including scrapping the candidature of a candidate violating electoral rules and code of conduct. Under the authority of Article 91B of the Representation of the Peoples Order, 1972 the Election Commission promulgated a Code of Conduct for Political Parties and Candidates for the Parliamentary Elections 2008, which later became the National Elections Political Parties and Candidates Code of Conduct (2013) (hereinafter known as 'The Code') (the translation of the title of the legislation is the researcher's own).<sup>30</sup> The Code had the status of a law, and persons could be punished and/or disqualified for violating it. The Code provided for a more controlled framework for campaigning. It maintained basic rights and freedoms, but also introduced various limitations compared to previous elections. The Code was designed to address problems experienced during past campaigns, particularly problems associated with 'black money' and 'muscle'.<sup>31</sup> In the following section, the researcher first sets out the main amendments to the Representation of the Peoples Order (1972) in relation to electoral rules relating to regulation, monitoring and disclosure of political finance, followed by the main provisions on non-electoral financing.

#### **7.3.3.4 Laws Relating to Electoral Financing**

The provisions of the Code relating to the regulation, monitoring and disclosure of political finance during campaigning and election days are as follows:

##### **i. Election expenses**

Election expenses include any expenditure incurred or payment made for the arrangement, conduct or benefit of, or in connection with or incidental to election

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<sup>30</sup> Since 1987 and the enactment of the *Bangla Bhasba Prachoron Ain 1987* or Introduction of Bengali Language Act 1987, all laws have been enacted in Bengali and an official English version is usually not available. Prior to 1987, all laws were enacted in English, a hangover from the Pakistan (when there were two state languages) and colonial eras.

<sup>31</sup> Report of the Commonwealth Observer Group, Bangladesh Parliamentary Elections, 2008, Commonwealth Secretariat, 11.



of a candidate.<sup>32</sup> This definition shows that the election expenditure made by any person on behalf of a candidate would be considered to be an expenditure incurred by the candidate himself.

## **ii. Obligation of pre-poll reporting**

When submitting a nomination paper, every candidate is required to include along with it and in the prescribed form, the probable source of his or her election fund.<sup>33</sup> These will include own income, sum to be borrowed or received as voluntary contribution from any relations or others or any organization. The disclosures must also include a statement of the candidate's assets, liabilities, annual income and expenditure and income tax return. A copy of the above statements has to be sent to the Election Commission at the time of their submission to the Returning Officer.

## **iii. Obligation of documenting election expenses**

The election expenses can be incurred only by the election agent (or by the candidate themselves if he/she would act as his/her own agent), others contributing to the election expenses must make the payment to the election agent.<sup>34</sup> Candidates incurring personal expenditure or persons making contribution shall within seven days of the declaration of the result of the election, send to the election agent a statement of such expenditure or particulars of such payment.<sup>35</sup> The bill and receipt voucher of every payment of more than Tk 100 is to be maintained by the election agent.<sup>36</sup> The legislative candidates running for election are obliged to include in their income reports, data on the

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<sup>32</sup> Article 44A, Representation of the Peoples Order 1972.

<sup>33</sup> Article 44AA, Representation of the Peoples Order 1972.

<sup>34</sup> Article 44B, Representation of the Peoples Order 1972.

<sup>35</sup> Article 44B (4), Representation of the Peoples Order 1972.

<sup>36</sup> Article 44B (5), Representation of the Peoples Order 1972.

date of each donation, the value of each donation, and the name of each donor.<sup>37</sup>

The election expenses are to be managed through a separate account with a scheduled bank operated by the agent/candidate.<sup>38</sup>

#### **iv. Limit of election expenses**

The highest amount a political party may spend during the election is based on the number of candidates it has nominated. Taka Four crore<sup>39</sup> and Fifty lakh<sup>40</sup> (if the number of candidates is more than two hundred), Taka Three crores (if the number of candidates is more than more than one hundred but less than two hundred), Taka One crore and fifty lakh (if the number of candidates is more than fifty but not more than one hundred), Taka Seventy Five (if the number of candidates is not more than fifty).<sup>41</sup>

#### **v. Mode of election expenses**

The election expenses cannot be utilised for printing a poster with more than one color or bigger than the size prescribed by the Election Commission, erecting any gate, arch, or barricade, making any banner using any cloth, setting up more than one election camp in any union, ward, posting of posters on walls or any installation, and using motorized vehicles for campaigns.<sup>42</sup>

#### **vi. Post-election reporting obligation**

Every election agent of a contesting candidate shall, within thirty days after the publication of the name of the returned candidate submit to the Returning

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<sup>37</sup> Article 44C (1), Representation of the Peoples Order 1972.

<sup>38</sup> Article 44BB, Representation of the Peoples Order 1972.

<sup>39</sup> One crore is equal to ten million.

<sup>40</sup> One lakh is equal to one hundred thousand.

<sup>41</sup> Article 44CC (3), Representation of the Peoples Order 1972.

<sup>42</sup> Article 44B (3A), Representation of the Peoples Order 1972.

Officer a return of election expenses in the prescribed form.<sup>43</sup> The return shall contain, among other things, a statement of all payments, bills, receipts, and bank statements; and shall be accompanied by an affidavit sworn severally by the contesting candidate and his election agent. A copy of all the above-mentioned documents must be sent to the Commission at the time of their submission to the returning officer.

#### **vii. Reporting obligation of Political Parties**

All contesting parties shall maintain proper account of all their income and expenditure for the period from the date of publication of notification till the completion of elections. Every party must indicate any donation above Taka five thousand, name and address of the donor, and the nature of donation. The election funds and expenses of a political party must be operated through a separate account with a scheduled bank.<sup>44</sup> A party cannot receive any donation amounting to more than Taka twenty thousand, unless it is made by cheque.<sup>45</sup> Every political party nominating any candidate for election shall submit its statement of election expenses to the Election Commission within ninety days of the completion of election in all constituencies. In the financial report the party must include in their income reports the date of each donation, the value of each donation and the name of each donor.<sup>46</sup>

#### **viii. Punishment for offences**

If a political party fails to submit the statement of election expenses after warnings, the Election Commission can fine the party Taka ten thousand and

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<sup>43</sup> Article 44C (1), Representation of the Peoples Order 1972.

<sup>44</sup> Article 44CC (1), Representation of the Peoples Order 1972.

<sup>45</sup> Article 44CC (4), Representation of the Peoples Order 1972.

<sup>46</sup> Article 44CCC, Representation of the Peoples Order 1972.

after 15 days of the fine if no statement of expense is submitted the Election Commission can cancel the political party's registration.<sup>47</sup> Punishment for meeting election expenses from any source other than the source specified by the contesting candidates in the expense statement submitted under Article 44AA, shall be two to seven years rigorous imprisonment with fine. The punishment is set out under Article 73, which states that funds from any source not specified in the expense statement is tantamount to a 'corrupt practice'.<sup>48</sup> Punishment for contravening the provisions of Article 44B (obligation of documentation of expenses, limit of expenses and the mode of spending) shall be two to seven years rigorous imprisonment with fine. Punishment for failing to comply with the provision of article 44AA or 44C (reporting obligations) shall be two to seven years rigorous imprisonment with fine.<sup>49</sup>

#### **ix. Access to information**

According to Article 44D of the Representation of the Peoples Order 1972, the statements, returns and documents submitted under article 44AA and 44C by political parties, shall, during one year from the date of their receipt, be open to inspection by any person on payment of the prescribed fee. The Election Commission will publish financial reports of the elections campaigns for the *Jatiyo Sangshad* elections on their website.

#### **7.3.3.5. Laws Relating to Non-electoral Financing**

Non-Electoral financing are those laws that relate to making political parties financially accountable even during non-campaign periods. The provisions of the Code relating to

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<sup>47</sup> Article 44CCC (5), Representation of the Peoples Order 1972.

<sup>48</sup> Article 73(2), Representation of the Peoples Order 1972.

<sup>49</sup> Article 74, Representation of the Peoples Order 1972.

the regulation, monitoring and disclosure of political party financing other than during the campaign and election period are as follows:

**i. Accounts maintenance of political parties**

Article 90F of the Code entitles a registered political party to receive donation or grants from any person, company or group of companies. The Political Parties Registration Rules 2008 (Article 9(B)) requires political parties to submit their financial audited report (audited by a registered Chartered Accountant firm) to the Election Commission by July 31 of every fiscal year. It is mandatory to have the accounts of the parties signed by a certified accountant.

**ii. Limits of private and corporate donation**

A political party can receive Taka 500,000 or property or service equivalent to it in a year, as personal donation. In case of corporate donation a party can receive Tk 2.5 million or property or service equivalent to it in a year. Any registered political party cannot receive any gift, donation, grant or money from any other country, non- government organization or from any person who is not Bangladeshi or any organization established and maintained by such person.<sup>50</sup>

**iii. Public subsidies**

There is no provision of direct public subsidy for the funding of political parties. However, according to Article 90(F) the registered parties will be entitled to electoral symbols, one set of electoral rolls in CDs or any other electronic form, broadcasting and telecasting facilities in the state-owned media during the general election.

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<sup>50</sup> Article 90(F), Representation of the Peoples Order 1972.

## 7.4. Candidate Nomination

As the above indicates, the Caretaker Government of 2007-2008 wanted to bring about transparency within political parties through electoral legal reform. The attempt was not only to bring about transparency through stricter electoral and political party finance regulation but also to promote internal democracy within political parties by reforming the candidate nomination process. According to scholars such as Duverger, Gallagher and Schattschneider, the candidate selection process of a party both affects and reflects the distribution of power within the party.<sup>51</sup> Schattschneider writes: 'the nominating process has become the crucial process of the party. He who can make the nominations is the owner of the party. This is therefore one of the best points in which to observe the distribution of power within the party.'<sup>52</sup> In most democracies political parties make their own rules of procedure for selecting candidates.<sup>53</sup> Theorists such as Strom classify institutional designs that affect the provision of information to voters as *ex-ante* and *ex-post* mechanisms.<sup>54</sup> These are mechanisms which voters use to learn about their agents before they act and after the fact respectively. Ex-ante mechanisms may include elements of screening and selection processes employed by political parties, where efforts are made to sort out good agents from bad ones. Parties help voters screen candidates for public office, while parliament screens potential cabinet members. There are many factors and limitations in candidate selection such as who is eligible to be a candidate, what are the territorial restrictions etc. but when it comes to the 'selectorate' or the body

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<sup>51</sup> Michael Gallagher and Michael Marsh, *Candidate Selection in Comparative Perspective: The Secret Garden of Politics*, (New York: Sage Publications, 1988) and Elmer Schattschneider, *Party Government*, (New Jersey: Transaction Publications, 1942).

<sup>52</sup> Schattschneider, 'Party Government', 101.

<sup>53</sup> For example, the African National Congress (ANC) has a guideline to nominate at least 33 percent female candidates. See, Mavivi Manzini, 'Political Party Quotas in South Africa' (Paper presented at the IDEA Parliamentary Forum Conference on 'The Implementation of Quotas: African Experiences', 11-12 November 2003, Pretoria, South Africa) and Mi Yung Yoon, 'Democratization and Women's Legislative Representation in Sub-Saharan Africa', *Democratization*, 8 (2009) 169-190.

<sup>54</sup> Kaare Strom, Muller Wolfgang and Bergman Torbjorn, *Delegation and Accountability in Parliamentary Democracies* (Oxford: Oxford University Press, 2004) 63.

that selects the candidates the method ranges between degrees of inclusiveness and exclusiveness.<sup>55</sup> Two methods that can make the selection process more inclusive or exclusive are: (1) the open method whereby the party's rank and file members get to vote in order to nominate their candidates, and (2) the closed method whereby candidate nomination is a closed door decision by the party elites.

The Bangladesh Constitution does not provide for any specific methodology for candidate selection and nomination. In fact, the only reference to political parties is in the context of parliamentary functions in Article 70, that bans floor crossing as explained in Section 5.2. However, in 2008 when the Representation of the Peoples Order (1972) was amended under the Caretaker Government, a significant change occurred to the legal framework for candidate selection and nomination. As discussed above in Section 7.3., the reforms have made registration of political parties with the Election Commission mandatory if they want to participate in the parliamentary election. Following this requirement, certain conditions have been set out before a political party can be registered as explained in Section 3.1. Along with other conditions for registering, Article 90B (b) of the Representation of the Peoples Order (Amendment) Act 2009 now makes it compulsory for political party constitutions to have a provision for only finalizing nomination of candidates after taking into consideration the recommendations of panels of members of the Ward, Union, Thana, Upazila or District committee, as the case may be of the concerned constituency.<sup>56</sup>

The following section sets out the formal nomination processes followed by the two major political parties in Bangladesh. This is followed by an analysis of the effectiveness

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<sup>55</sup> Gideon Rahat and Reuven Hazan, 'Candidate Selection Methods: An Analytical Framework', *Party Politics*, 3 (2000) 301.

<sup>56</sup> Article 90B (b), Representation of the Peoples Order 1972.

of the rules in place by using the Awami League selection process for the Narayanganj City Corporation Polls held in 2011 as a case study.

#### ***7.4.1. Candidate Selection Rules of the Awami League and the Bangladesh Nationalist Party***

The central selection committees of political parties in Bangladesh are known as 'Parliamentary Boards' and the purpose of this board is to act as gatekeeper and select candidates for the parliamentary election. Both the two major political parties have Parliamentary Boards. Article 27 of the Awami League constitution makes it mandatory for the party to set up a Parliamentary Board to oversee the process of selection of candidates.<sup>57</sup> The Awami League Parliamentary Board constitutes of eleven members, elected by the Awami League Council from amongst the members of the Council,<sup>58</sup> including the party's president, general secretary and deputy leader. While the Parliamentary Board is given all authority to select candidates, the party president makes the final decision. District or constituency level committees prepare a panel of candidates after scrutinizing applications and the Parliamentary Board makes the final decision. Although, the nomination is expected to be given to one of the names on the list of the constituency level committee, this is not always the case.<sup>59</sup> According to the Bangladesh Nationalist Party's constitution, the Parliamentary Board is appointed under the leadership of the party chairperson.<sup>60</sup> The party's Standing Committee members along with the president, three vice presidents and the general secretary of the particular district form the rest of the members of the Parliamentary Board. A list is sent to the Parliamentary Board from a grassroots committee, but the board is free to choose any

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<sup>57</sup> Article 27, Awami League Constitution.

<sup>58</sup> The Awami League Council is a part of the Central Working Committee.

<sup>59</sup> KM Mahiuddin, 'Candidate Selection Process: An Analysis of Post 1990 Parliamentary Elections in Bangladesh', Research Report, Department of Economics and Politics, Jahangirnagar University, Dhaka, (Date Unknown).

<sup>60</sup> Article 13, Bangladesh Nationalist Party Constitution.



person as a candidate even if their name does not appear on the list on the grounds that they are ‘important’ to the party.<sup>61</sup>

The Parliamentary Board of each political party is supposed to make its selection after interviewing the entire panel of candidates as selected by the district committee. While these interviews do take place, it has been observed that there are no written procedures or grading systems for candidates.<sup>62</sup> The Parliamentary Board is expected to rank each possible nominee depending on their past parliamentary experiences, financial capacity, service and loyalty to the party, popularity and likelihood to win the seat. The background information on possible candidates is collected via survey teams that are sent to the constituency. Both the Awami League and the Bangladesh Nationalist Party send out survey teams. While these formal processes are in place and have been made mandatory since the electoral reforms of 2007-2008, these rules appear to have been ineffective in genuinely democratizing the candidate nomination process.

The author interviewed senior members of both the Bangladesh Nationalist Party and the Awami League in order to get an idea of the nomination process followed by each party, and it appears that while the formal rules are in place, political parties view these rules as flexible or non-binding. For example in an interview with a member of the Standing Committee of the Bangladesh Nationalist Party, the author was told:

*When the schedule is announced by the Election Commission, normal schedule and suppose if we are taking part in the election, we will then have a form of our own which we sell to the intending candidates. We allow everyone to apply, so that no one can say that we’re being left out or it’s not universal. And they have to pay fees, 10,000 or 20,000 taka whatever it is, so*

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<sup>61</sup> Mahiuddin, ‘Candidate Selection Process: An Analysis of Post 1990 Parliamentary Elections in Bangladesh’.

<sup>62</sup> Mahiuddin, ‘Candidate Selection Process: An Analysis of Post 1990 Parliamentary Elections in Bangladesh’.

*that is income of the party. Now suppose there are 300 constituencies and we get, say, average five applicants (per constituency), so that means 1500 candidates will be there, average. All these 1500, they will be scrutinized and they all will be called for an interview. The Standing Committee of Bangladesh Nationalist Party, which is the highest body, they are also called the Parliamentary Board, so each candidate, whoever has applied, whether I mean good/bad, known/unknown, will have an opportunity to meet the highest body. And there in the long table, we allow him to sit there, we ask him, questions; he also can ask us questions. Also we can ask him how long he has been with the party and we also try to find out his financial situation because we want to win the seat; that is very important. So for a political party, both for Awami League and Bangladesh Nationalist Party, winning the seat is the most important thing. It's an election politics, so seat is very important. So there suppose in one area, in a constituency, there a dedicated leader is there but he has no means. Maybe he will get support, you know, but we know that the opposition candidate is very strong. So there, if I have a candidate with money, I give nomination to him to try out, so he can get the seat back for us.<sup>63</sup> Also if the voters know that the candidate has money, then he's had it, then he will have to pay. Not the voters, ordinary voters, they don't ask for anything, it is the party workers, the middle boys.<sup>64</sup>*

In another interview a past Awami League Cabinet Member, said;

*In order to seek nomination from the Awami League you have to submit a form along with a one thousand taka bond. This form is like a CV and contains information such as who I am, what has been my political identity, what I have done for the constituency before and that kind of thing. After this, for the Awami League the procedure kicks in. Awami League has a committee in every Upazila and also union committees. So individuals from the Upazila Union Committee sit down and over there either through open or secret voting they decide on, say, five*

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<sup>63</sup> Emphasis added.

<sup>64</sup> Interview T.

*candidates. Then they send these five names to the Awami League parliamentary board. So they will send the names stating that no. 1 candidate has 92% of the votes; No. 2 is Mr. Alpha 3%; Mr. Bravo 2% etc... Once the central committee receives the recommendation they usually call all the possible nominees from the constituency, say ten or fifteen people, and give them a small briefing. During this briefing the possible candidates are told that it is not possible to nominate all of them so they should discuss amongst themselves and choose one person. This never happens so ultimately the candidates say 'well we are seeking nomination but it's up to you, you decide and we will all work for that person'. And then on a particular day the nomination is declared... My observation is that 100% of the time it is not the person recommended by the party who is nominated, nor is the name recommended by the party rejected 100% of the time. I would say about 60—70% percent nominations are given to those recommended by the party.<sup>65</sup>*

It has been observed that though suggestions by the grass roots committees are taken into account, in the event the party leader does not agree with any of the suggested candidates or prefers a candidate whose name is not on the list forwarded by the District Committee, then the recommendation of the District Committee are ignored.<sup>66</sup> Thus, it seems that Parliamentary Boards do not consider the District Committees recommendation binding. In the 2008 election, the Bangladesh Nationalist Party started their candidate selection process late and within three days of selling nomination forms they completed all the interviews without sending the applications to local level party committees for their opinion. The Awami League did better in 2008 and it is observed

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<sup>65</sup> Interview J.

<sup>66</sup> Mahiuddin, 'Candidate Selection Process: An Analysis of Post 1990 Parliamentary Elections in Bangladesh'.

that in only about 30% of constituencies nomination was given to a candidate whose name was not at all present in the list sent by the local committee.<sup>67</sup>

## 7.5. Case Study: Narayanganj City Corporation Polls 2011

Traditionally, political parties in Bangladesh are highly centralized and decision-making authority, especially in relation to important electoral decisions such as candidate nomination, remains in the hands of the party leader and his/her closest advisors.<sup>68</sup>

During interviews with relevant actors, the researcher found that most believed that changes in the legal framework have done little to democratize the candidate nomination process. During interviews with leaders of major political parties, election observers and NGOs involved with elections, the researcher found that most persons believed that dynastic and patronage links in the form of loyalty, muscle or money were very important in order to receive a nomination from the major political parties. For instance, the researcher heard similar grievances about the nomination process from an NGO observer, Supreme Court lawyer and constitutional expert and a politician as set out below:

*Businessmen are getting into politics by spending their own money, even in their constituencies. But then in two to three years they have to make back the money. Tolls will have to be collected.*<sup>69</sup>

*Really what you have is selling of nominations. Any number of cases you will see local people had a good candidate but he has been brushed aside by the party. Nomination process is just rotten. It is not by party, it is one person. Party doesn't exist as a party, one person and a little*

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<sup>67</sup> Mahiuddin, 'Candidate Selection Process: An Analysis of Post 1990 Parliamentary Elections in Bangladesh'.

<sup>68</sup> BRAC, State of Governance Report 2006, 16.

<sup>69</sup> Interview with a Senior Advisor at the National Democratic Institute, Bangladesh Chapter. Interview W.

*court controlling a syndicate through money. And of course money also gets muscle power. They said through the reforms of the last election (Caretaker Government reforms of 2007-2008) that person will be nominated with consultation with the local level. But this doesn't matter. This is politics. Paying for nomination. Paying people to vote for you.*<sup>70</sup>

*Frankly, there is no democracy within the party, it's the two leaders who are in fact the most important organ of the party, whatever they decide, that is the rule. And this includes the candidate selection process.*<sup>71</sup>

Thus, it would appear that observers and participants in the electoral process in Bangladesh are generally convinced that the nomination process is eschewed and nominations are given on the basis of informal considerations such as money or muscle power. This is because candidate nomination in Bangladesh is an area that is deeply important for the patron-client networks on which Bangladeshi political parties depend for their survival. Some of the most valuable benefits that clients compete for and political leaders dole out are party posts and party nominations. The following is an analysis of the Awami League's decision to support a controversial candidate in the Narayanganj City Corporation Poll in 2011. The Awami League's decision became a damaging scandal for the party and brought the accountability and democracy within the party to question, particularly in the candidate nomination process. The events in Narayanganj also demonstrate how divided political parties are and illustrate the workings of factions. The reason that the researcher chose this particular nomination as a case study is that the nomination became a national level scandal and has been widely covered by the media, hence making access to details easier.

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<sup>70</sup> Interview with s Supreme Court Lawyer. Interview N.

<sup>71</sup> Past member of Parliament. Interview V.

### *7.5.1. Osman Selected over Ivy: Factions, Dynasties and the Nomination Process*

While political parties do not directly and officially nominate candidates for city corporation polls in Bangladesh, they usually give their support to a candidate and also back their campaign. The political party that is backing the candidate has a huge impact on the likelihood of success because voting in Bangladesh happens on the basis of political party symbols and association rather than on charisma of the particular candidate.<sup>72</sup> Given the poor rates of literacy in Bangladesh (57.7% according to UNICEF statistics updated in 2013<sup>73</sup>) it would seem logical that voters are voting for personalities in local constituencies rather than for parties. However, according to Rahaman, although Bangladesh lacks a strongly structured party system and it would be expected that voters lack the ability to vote for party images, elections in Bangladesh are highly party-centric. Rahaman argues that ‘in many cases, they (the voters) could not even name the candidates and decided to vote for either of the two biggest parties.’<sup>74</sup> This is because of the structures of patronage, patrimony and dynastic politics that exist in Bangladesh, making the leaders of the Awami League and Bangladesh Nationalist Party, Sheikh Hasina and Khaleda Zia, the notables that voters vote for. Given the voting pattern that relies on political party symbols, the support of national level political parties becomes very important even for local elections.

The Narayanganj City Corporation Polls were held on 30 October 2011. Two candidates went to Sheikh Hasina to ask for her blessing and the backing of the Awami League for their nomination. The candidates were Shamim Osman and Salina Hayat Ivy. A Committee headed by senior Presidium member Sajeda Chowdhury would select and

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<sup>72</sup> Muhammad Mustafizur Rahaman, ‘Parliament and Good Governance: A Bangladeshi Perspective’, *Japanese Journal of Political Science*, 9 (2008) 44.

<sup>73</sup> Please see <[http://www.unicef.org/infobycountry/bangladesh\\_bangladesh\\_statistics.html](http://www.unicef.org/infobycountry/bangladesh_bangladesh_statistics.html)> (Accessed on 5 September 2015).

<sup>74</sup> Rahaman, ‘Parliament and Good Governance: A Bangladeshi Perspective’, 44.

formally recognize the Awami League candidate.<sup>75</sup> While the committee met with both contenders, it failed to select a candidate. Both candidates were deeply associated with the Awami League and adamant to contest under the Awami League banner. Eventually the Awami League central leaders told the media that the party would not give its official backing to any candidate, since the party did not want to alienate either candidate.<sup>76</sup> However, soon after this announcement, three organizing secretaries of the central Awami League went to Narayanganj and declared their support for Osman.<sup>77</sup> Ivy made a statement that this was not the decision of the party and the Awami League senior joint general secretary, Mahbubul Haque Hanif, also told the media that this was not the decision of the party.<sup>78</sup> Despite these statements, many Awami League Members of Parliament, ex-ministers and central leaders of the party and its front organization extended their support to Osman going as far as to openly campaign for him as the Awami League candidate.<sup>79</sup> Thus, for all practical purposes Osman received the Awami League backing.

However, what is interesting from the perspective of the candidate nomination process and how democratic this process has been, is that Ivy always had the highest support in the locality. Political observers stated that Ivy's acceptance rate was the highest amongst voters and that in terms of track record, Ivy, who was the chairman of Narayanganj city corporation, was known as the 'cleanest character'.<sup>80</sup> On the other hand, Osman is feared in Narayanganj and is known as a 'muscleman'.<sup>81</sup> Both Ivy and Osman come from families long associated with the Awami League and both their fathers served as leaders

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<sup>75</sup> 'AL Still in A fix as Ivy, Shamim rigid', *Priyo News*, 11 October 2011; The author was able to interview Sajeda Chowdhury for the purpose of this research.

<sup>76</sup> Shamim Ahmad, 'The Importance of Narayanganj', *Dhaka Courier*, 27 October 2011.

<sup>77</sup> 'AL supports Shamim Osman', *BD News 24*, 13 October 2011.

<sup>78</sup> 'Hanif, Suranjit deny AL support to Shamim Osman', *Bangla Newspaper*, 16 October 2011.

<sup>79</sup> 'AL supports Shamim Osman', *BD News 24*, 13 October 2011.

<sup>80</sup> Shamim Ahmad, 'The Importance of Narayanganj', *Dhaka Courier*, 27 October 2011, Dhaka.

<sup>81</sup> 'Say No to Evil' Star Cover Story, *The Daily Star*, 28 October 2011.

of the Awami League.<sup>82</sup> Shamim Osman's family is more closely tied to Sheikh Hasina because upon Sheikh Hasina's return to Bangladesh in 1981 for the first time since the murder of Sheikh Mujib, Shamim Osman's father is known to have provided her protection.<sup>83</sup>

In the end, Ivy won the City Corporation Polls in 2011 despite the Awami League backing Osman. Ivy always had substantially more voter support (the Daily Star notes that initial surveys indicated that Ivy would receive 130,000 votes while Osman would receive 75,000 votes<sup>84</sup>) than Osman, yet the Awami League made a decision to back Osman and lost the Narayanganj mayoral seat. This arguably indicates that the Awami League's decision to give its backing to Osman was perhaps influenced by political and social pressures not explainable through an exploration of only the formal rules.

The candidate selection process of the Awami League for the 2011 Narayanganj City Corporation Polls highlights a number of informal considerations that take precedence over formal selection rules. While the 2007-2008 reforms tried to externally impose regulation on Bangladeshi political parties in order to make the nomination process more democratic, and the formal rules require an open method of selection, in practice the selection is very much in the hands of the party leaders. These nominations are often made on the basis of patronage relationships, dynastic politics, money and muscle and not policy considerations. This leaves the voter with a poor choice of candidates to select from when election-day comes around. This conflicts with the expectation in a parliamentary democracy from the candidate selection process. As set out above, Strom et al, notes that it is at the candidate nomination stage that the electorate is provided with an *ex-ante* mechanism of information through 'centralized, cohesive, policy-oriented

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<sup>82</sup> Shamim Ahmad, 'The Importance of Narayanganj', *Dhaka Courier*, 27 October 2011, Dhaka.

<sup>83</sup> 'Hasina Defends Osman's', *The Bangladesh Chronicle*, 3 June 2014.

<sup>84</sup> Shahrier Khan and Reaz Ahmad, 'Hasina Gave into Tears', *The Daily Star*, 1 November 2011.



political parties<sup>85</sup> which align the preferences of the candidates for political offices by selecting the right pool of candidates. Unfortunately, in Bangladesh's clientelistic system, candidate nominations are distributed as benefits to clients (faction leaders and political party middle-men) in exchange for favors such as mobilization<sup>86</sup> and do not provide a screening process for better representatives for the voters.

The case of the mayoral election in Narayanganj highlights three aspects of the informal rules in the politics of Bangladesh; first, the importance and precedence of dynastic politics and patrimonial relationships is highlighted; second, it shows that candidate nomination is based on money, organizational capacity and patronage and not the selection rules set out in political party constitutions; and finally, it shows that higher level factions often have difficulty containing lower level factions, especially when these get too powerful.<sup>87</sup> The following sections will discuss each of these aspects in more detail.

#### **7.5.1.1. Dynastic Politics and Patrimonial Relationships**

According to Inge Amundsen, dynastic and family politics in South Asia, particularly India, Bangladesh and Pakistan is a 'vote catcher'.<sup>88</sup> In other words dynasties and family politics attract votes in these countries. There are several reasons for this. Firstly, wherever there are large illiterate populations, people who are more known simply gain more votes.<sup>89</sup> This is particularly the case when political parties have hardly

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<sup>85</sup> Strom, Wolfgang and Torbjorn, Delegation and Accountability in Parliamentary Democracies, 64.

<sup>86</sup> For an understanding of the type of benefits that are exchanged in return for mobilization and why this is so important, please see, Mushtaq Khan, 'Class, Clientelism and Communal Politics in Contemporary Bangladesh', The Making of History: Essays presented to Irfan Habib, e.d. K.N Pannikar, T.J. Byres and U. Patnaik, New Delhi, Tulika, 2000.

<sup>87</sup> Mushtaq Khan, 'Bangladesh: Partitions, Nationalisms and Legacies for State Building', Department of Economics, SOAS, University of London, July 2010.

<sup>88</sup> Inge Amundsen, 'Dynasty or democracy? Party Politics in Bangladesh', CMI Brief, Vol 12, No 6, November 2013.

<sup>89</sup> Amundsen, 'Dynasty or democracy? Party Politics in Bangladesh'.

distinguishable policies. Secondly, the First Past The Post system particularly encourages charisma and personality based politics and politics tend to focus on personalities and families.<sup>90</sup> Finally, family based politics becomes important in clientelistic societies such as Bangladesh because of the high level of factionalism. This means that a strong and unquestioned leader of the party is the only one that can hold the party together. This is why, even defeated leaders are not pushed out of the chairmanship of the party – their leadership is not questioned and is accepted by everyone. This dynastic mindset, as argued by authors like Kochanek, finds its roots in the social structures and historical developments of a country in transition – gaining legitimacy from charismatic leadership and patronage during and after the liberation war.<sup>91</sup> As Kochanek notes about Bangladesh post-1971, '[i]n the absence of social cohesion, political consensus, strong ideological commitment or effective organizational structures, charisma, patrimonialism, and patronage have become the only mechanisms for building and sustaining political support'.<sup>92</sup> Rahaman similarly notes that:

*[t]he reason patrimonial leadership is deep-rooted in Bangladesh is because the people are emotionally attached through patron-client relations to either Khaleda Zia or her late husband (Ziaur Rahman), or to Sheikh Hasina and her assassinated father (Sheikh Mujib). In a hierarchical organization, such patron-client relations are perpetuated through a reciprocal system where followers work for their superiors or patrons with a view to gaining benefits, while patrons provide material benefits or opportunities.*<sup>93</sup>

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<sup>90</sup> Amundsen, 'Dynasty or democracy? Party Politics in Bangladesh'.

<sup>91</sup> Stanley Kochanek, 'Patron-Client Politics and Business in Bangladesh', *Sociological Bulletin*, 44 (1995) 53.

<sup>92</sup> Kochanek, 'Patron-Client Politics and Business in Bangladesh', 53.

<sup>93</sup> Muhammad Mustafizur Rahaman, 'Origins and Pitfalls of Confrontational Politics in Bangladesh', *South Asian Survey*, 14 (2007) 101.

During an interview with Member of Parliament (who is a relative of Sheikh Hasina) the researcher asked why family connections are so important for elections in Bangladesh and was told:

*I think it's about people's confidence, they wouldn't like to switch to somebody they don't know, so they would like to bet their confidence in somebody who has a record, family record, of doing something for the people, because, after all, you are bestowing something to a person, some authority, some power, so people would like to bestow that to somebody who they know, they know their family background and they know they have confidence that he will not violate those responsibilities or obligations. So I think that sort of perception or mentality works amongst the voters and that's why they tend to go for a sure bet, that this is a person who they know or this is a person whose family they know and they believe or they have the confidence that this person would work for them, rather than going for somebody new or somebody coming from a low background or who doesn't have any background, completely fresh, to have their confidence in such a person... I think it's about people's choice, and this is democracy and this is the will of the people.<sup>94</sup>*

According to a Dhaka daily, Sheikh Hasina's final decision to back Shamim Osman's candidacy was based on a tearful plea from him.<sup>95</sup> According to the daily, a senior member of the Awami League informed them that Sheikh Hasina had even offered Osman a state ministership to back off from the mayoral race.<sup>96</sup> However, Osman refused and in the end Sheikh Hasina was compelled to back him because of family ties and the fear of rebellion. This is an illustration of how higher level leaders often have to give in or balance distribution of benefits to lower level leaders in order to keep the party from fragmenting. This also shows that while democratic laws may be in place, they are

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<sup>94</sup> Interview H.

<sup>95</sup> Naraynaganj City Polls: Hasina gave in to tears, intelligence, *Priyo News*, 1 November 2011.

<sup>96</sup> Naraynaganj City Polls: Hasina gave in to tears, intelligence, *Priyo News*, 1 November 2011.

not always compatible with informal networks. Thus, whichever the reason may be, loyalty or the temptation of material benefits and organizational power, the end result is that in Bangladesh dynastic, patrimonial politics is the norm. Starting from the top leadership (both Sheikh Hasina and Khaleda Zia are carrying on their family dynasties) to the grassroots, political leaders often come from political families. Family connections between the elite are highly visible, and Kochanek contends that these connections often shape political participation, restructure and integrate group loyalties and identities and make demands upon the political system.<sup>97</sup> It may be argued that the Awami League gave Osman its backing instead of backing Ivy, despite her popularity, because of underlying informal requirements of maintaining dynastic and patrimonial loyalty.

#### 7.5.1.2. Money, Muscle and Patronage Loyalty

It is also important to consider the role of money, organizational strength (known as ‘muscle’ in Bangladesh) and how patronage support from faction leaders are maintained in order to answer why the Awami League backed Osman rather than Ivy. Khan notes, in Bangladesh bargaining power of factions and faction leaders depends on ‘the number of people who can be mobilized by the faction for elections...local level enforcement networks, organizing civil protests, demonstrations... and other forms of activity which aim to inflict costs on those who refused to make deals or offer pay-offs to that faction.’<sup>98</sup> Osman got the nomination despite having 17 cases filed against him.<sup>99</sup> However, the fact that he had 17 cases filed against him may very well be the reason he got the nomination. Osman is known in Bangladesh as an Awami League ‘muscle’ man and an article in the Daily Bangladesh states, ‘The name of Shamim Osam, a local ruling party lawmaker and sometimes called a “godfather” has come up repeatedly in

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<sup>97</sup> See generally, Kochanek, ‘Patron-Client Politics and Business in Bangladesh’.

<sup>98</sup> Mushtaq Khan, ‘Markets, States and Democracy: Patron-Client Networks and the case for Democracy in Developing Countries’, *Democratization*, 12 (2005) 714.

<sup>99</sup> ‘Only Ivy among frontrunners has clean sheet’, *The Daily Star*, 5 October 2011.

connection with the seven murders. It is nothing new for him because every time a major crime takes place in the port city (Narayanganj), his name comes up.’<sup>100</sup> If there is truth in allegations that Osman provides ‘muscle’ and organizational capability for the Awami League, then that may be the reason that Sheikh Hasina felt compelled to give him tacit support despite protests from civil society and from within the party. According to Khan, in Bangladesh, the personalization of leadership is not based on traditional deference or the greater susceptibility of developing country societies to charisma, but is a rather ‘modern’ phenomenon in that political leaders offer payoffs to those who support them.<sup>101</sup> In turn, clients or faction leaders capture the resources for making these payoffs by mobilizing their supporters.<sup>102</sup> If political leaders and parties are unable to make the pay-offs that they promised, then clients will shift loyalty and support whoever is willing to give them the best deals. Thus, it may be that the Awami League felt too indebted to Osman and relied too heavily on him for mobilizing, to deny him their backing for the mayoral elections and lose his loyalty. Indeed, after Osman lost the mayoral election, the Awami League gave him their nomination for Member of Parliament in the 2014 general election.

According to Adil Khan:

*one of the main reasons why competent and honest candidates fail to participate in the party based nominations process is due to the high transaction costs that accompany such a process. The existing arrangements favour the wealthy (and sometime a combination of wealth and “muscle power”) over quality. Also under the existing arrangements, the aspiring candidates who seek party nominations expect that by investing (heavily) in the nomination as well as the*

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<sup>100</sup> ‘Chronicles of a Crippled District’, *The Daily Bangladesh*, 5 December 2014.

<sup>101</sup> Mushtaq Khan, ‘Class, Clientelism and Communal Politics in Contemporary Bangladesh’, *The Making of History: Essays presented to Irfan Habib*, e.d. K.N Pannikar, T.J. Byres and U. Patnaik, New Delhi, Tulika, 2000, 8.

<sup>102</sup> Khan, ‘Class, Clientelism and Communal Politics in Contemporary Bangladesh’, 8.

*election processes (initially, to get party nomination and later, on election campaign to attract votes) and winning the elections, some sort of patronage, usually financial, will be made available to them to recover their election-related investments, perhaps few times over, in the future.*<sup>103</sup>

Given the circumstances under which the Awami League gave its backing to Shamim Osman during the 2011 City Corporation Polls in Narayanganj, it may be assumed that factors other than popularity of the candidate and the likelihood of winning the seat were taken into consideration by the Awami League. In fact, the factors raised by Adil Khan for reasons behind the lack of good candidates in Bangladesh, possibly had a role to play. The highly personalized governance structure derived from dynastic politics means that intra-party relationships are essentially characterized by patron-clientelism and sycophantic conformity.<sup>104</sup> The chairperson and a small group of senior leaders select party leaders on the basis of patrimonial loyalty. This undermines the party as a locus for grooming capable and effective leaders. Rahaman notes that '[t]here is no example in our recent political history that any leader of these two parties (the Bangladesh Nationalist Party and the Awami League) has braved to oppose any proposal or decision of their chiefs. They (the chiefs) remain the key sources of power in their parties', and other party leaders get their posts only according to the 'sweet will' of their chiefs.<sup>105</sup> Thus, the formal legal requirements of taking into account grassroots recommendations are laws only on paper. The reality of candidate nominations in Bangladesh is very much a centralized decision, made by the party chief, on the basis of considerations that are important for informal institutions.

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<sup>103</sup> Adil Khan, 'Democracy and its Electoral Challenges: The case of Bangladesh', <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan028465.pdf>> (Accessed on 5 September 2015).

<sup>104</sup> BRAC, State of Governance in 2006, 16.

<sup>105</sup> Rahaman, 'Origins and Pitfalls of Confrontational Politics in Bangladesh', in *South Asian Survey*, 14 (2007) 101.

## 7.6. Conclusion

According to Strom et al, political parties are organizations that align the preferences of the occupants of political offices and subordinate them to centralized control. They thereby present to the voters a package of candidate agents whose policy preferences are fairly well understood, and whose behavior will be strictly policed by this semi-public organization (the political party).<sup>106</sup> Strom et al. further elaborate that, '[p]arty control means extensive screening of prospective parliamentarians as well as potential cabinet members. Before candidates gain access to higher office, they must acquire the proper party credentials and prove themselves in lesser offices.'<sup>107</sup> However, in the clientelistic context of Bangladesh, though the laws give the party even at the grassroots level substantial power to put in place ex-ante screening mechanisms by requiring grassroots selection committees, in reality as can be seen from the example above, nominations lie in the hands of the leadership. In Bangladesh, political parties have failed to act as a screening agent for electoral candidates and voters are therefore left with little choice of 'good' candidates, with aligned policy preferences and clean track records.

Given the circumstances under which the Awami League gave its backing to Osman during the 2011 City Corporation Polls in Narayanganj, it may be assumed that factors other than popularity of the candidate and the likelihood of winning the seat were taken into consideration by the Awami League. The chairperson and a small group of senior leaders select party leaders on the basis of patrimonial loyalty. This undermines the party as a locus for grooming capable and effective leaders. Further, often party leaders are beholden to clients because of past acts of loyalty and mobilization and the need for future loyalty and support and are therefore obligated to distribute benefits (including

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<sup>106</sup> Strom, Wolfgang and Torbjorn, 'Delegation and Accountability in Parliamentary Democracies', 64.

<sup>107</sup> Strom, Wolfgang and Torbjorn, 'Delegation and Accountability in Parliamentary Democracies', 64.

nominations) in order to maintain that loyalty. The reliance on patronage based distribution of benefits and the power of mobilization patronage networks provides for political parties brings us to the concluding chapter of the thesis. This chapter elaborates on the author's thoughts on the relationship between law, patronage, factional politics and violence in Bangladesh.



## Chapter 8 – Conclusion and Further Thoughts

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### 8.1. Introduction

Throughout this thesis, it has been argued that formal electoral institutions in Bangladesh are weak and that these weaknesses are further exaggerated because of informal institutions that are in conflict with the *raison d'être* of the formal institutions. The precedence of informal institutions in Bangladesh has reinforced many of the difficulties that formal institutions are faced with, including weak institutional rules (such as dependence on the government for budgets, recruitment etc. as highlighted with regards to the Election Commission and the Judiciary in Chapters Four and Six respectively) and undue influence from the executive. Corruption, patronage, nepotism and personalized rule of the patron-client kind have politicized the bureaucracy and other institutions of accountability such as the Judiciary and have had an outcome on electoral rule making and rule implementation. Levitsky and Helmke point to the necessity of studying how informal institutions and rules change the outcome of formal institutions.<sup>1</sup> For example, the case studies of the 2006 voter list and the 15th amendment provide examples of when the influence of informal institutions have resulted in an outcome not expected from democratic institutions of accountability (a fraudulent voter list and a constitutional amendment that has in effect put an end to multi-party elections in Bangladesh). In Bangladesh, the existence of informal norms and patterns of behavior that are followed and everyone expects to continue to follow have allowed the executive to use formal, constitutionally mandated and separated institutions to promote partisan interests and manipulate electoral reform so as to give the incumbent greater control over electoral results. This in turn has further compounded dilemmas of democracy and governance

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<sup>1</sup> Steven Levitsky and Gretchen Helmke, 'Informal Institutions and Comparative Politics: A Research Agenda', Working Paper 307, *Kellogg Institute for International Studies*, September 2003, 5.

such as stronger majorities in Parliament, centralization of power in the hands of political party leaders, confrontational politics, parliamentary boycotts and politicized use of other branches of the state such as the Judiciary and law enforcement agencies.

The case studies used in this thesis, such as the 2006 voter list, the passage and consequences of the 15<sup>th</sup> amendment (abolition of the Caretaker Government), and political party nomination processes, have highlighted how institutions of accountability formed with the intention of providing checks and balances plays into the demands of the executive, thereby corroding democratic consolidation and threatening democracy's survival in Bangladesh. Further, the analysis of interviews conducted for this research and interviewee explanations of phenomena such as patronage, politicization and partisanship have revealed how these informal institutions are manifested. The dissertation shows, with specific examples, that such institutions are prevalent and take precedence over formal institutions, and this distorts the type of outcome and behavior expected from formal institutions. For example, in the case of candidate nomination, it is shown that the Awami League possibly felt compelled to give their backing to Osman for the 2011 Narayanganj Mayarol elections, despite Ivy having more support, because of underlying requirements of maintaining patronage loyalty (Section 7.5). The outcome for the formal institution, in this case the political party, was that it did not act as an ex-ante screening mechanism for candidates and failed to give voters a choice of candidates who met certain policy leanings and check lists such as no criminal records.

In describing the underlying causes of democratic erosion and breakdown in Bangladesh, much of the literature has taken what Shapiro identifies as the path-dependent and cultural tracks.<sup>2</sup> Path-dependent tracks use historical factors to explain the lack of democratic institutionalization (authoritarian regimes and military intervention; the

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<sup>2</sup> Ian Shapiro, *The State of Democratic Theory*, (Princeton,; Princeton University Press, 2003) 86.

nature of authoritarian regime transitions – assassinations, coups, and politics of the street; the practice of election rigging and so on) and to explain why politics keeps reverting to historical authoritarian tendencies. Cultural tracks describe the cultural gap between traditional patrimonial Bangladeshi society based on patron-clientelism and liberal democratic principles. However, there is a gap in the literature in that there are no studies on how law making is affected as a result of these path-dependent pathologies (weak institutions) and cultural gaps (such as patronage, dynastic politics, politics of the street etc.). This thesis is a first attempt to do so by taking electoral reforms and studying the affect of both institutional weakness and cultural gaps on the type of reforms that have been enacted and how they have been enforced.

The norm amongst scholars studying Bangladeshi politics and society has usually been to study the formal and the informal separately. Those who have studied formal institutions have focused on formal weaknesses in the law and blamed these on path-dependence (for example, the removal of the Election Commission Secretariat has been blamed on Ershad's authoritarian regime and the willingness of democratic governments to maintain control over the Election Commission in imitation of previous authoritarian regimes);<sup>3</sup> and those who have studied informal institutions have focused on ethnographic field-based studies of relationships between patrons and clients (Mushtaq Khan explains how clients shift loyalty and are willing to support whichever political party will distribute the most benefits to them<sup>4</sup> and Joseph Devine studies how NGOs are also treated like patrons because patron-client traditions are so ingrained in Bangladesh).<sup>5</sup> While scholars have succeeded in pinpointing the fundamental concerns with democracy in Bangladesh,

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<sup>3</sup> Sakhawat Hussain, *'Electoral Reform in Bangladesh 1972-2008'*, (Dhaka: Palok Publishers, 2012) 50-51.

<sup>4</sup> Mushtaq Khan, 'Class, Clientelism and Communal Politics in Contemporary Bangladesh', *The Making of History: Essays presented to Irfan Habib*, e.d. K.N Pannikar, T.J. Byres and U. Patnaik, New Delhi, Tulika, 2000.

<sup>5</sup> Joseph Devine, 'NGOs, Politics and Grassroots Mobilisation: Evidence from Bangladesh', *Journal of South Asian Development* 1 (2006): 77-99.

such as patronage, dynastic politics, corruption, centralization of power in the hands of the executive, contentious politics and political violence, they have not provided specific examples to illustrate how these concerns affect the arena of formal laws. Nor is there any literature on the effect of law on informal institutions. To date, no study has gone beyond a cursory look at the relationship between law making and reform and how informal norms influence these. For example, while there are references to the politicization of the Judiciary as a result of patronage appointments, there is no study on what this has meant for judicial development of law. Studies with regards to statist judicial behavior have focused on specific issues such as the harassment of opposition parties, the accountability of government officers or human rights, but have rarely touched on the nature of judicial law making in Bangladesh.<sup>6</sup> The case studies used and interviews conducted for this study are a first step towards understanding the role of the informal in the relationships between different formal arms of the state and what that has meant for electoral reform and implementation of electoral laws. By getting an account of what influences electoral reform and when and how these are implemented (for example interviews with lawyers in relation to the mandatory disclosure of candidates' information case study and interviews with politicians regarding nomination processes) this study provides a first insight into the *informal within formal electoral laws* in Bangladesh. Given the varied nature of informal institutions, the use of very specific, narrowed down case studies also provides a methodology to begin understanding how informal institutions manifest. The analysis of publicly unseen and unknown documents (letters between politicians, minutes of meetings etc.), events (such as what happened inside the court room during the voters' right to information hearing in February 2007)

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<sup>6</sup> See, Awal Mollah, 'Does the Judiciary Matter for Accountability of Administration in Bangladesh', *International Journal of Law and Management*, 53 (2010) 309-331; and Hoque, 'The Recent Emergency and the Politics of the Judiciary', *NUJS Law Review*, 2 (2009): 183-203.

and anecdotal evidence has allowed this research to highlight unique findings in the context of Bangladesh.

The formal institutions discussed in this thesis include executive-legislative relations, electoral rules, the Judiciary,<sup>7</sup> the Election Commission, Parliamentary Committees and Political Parties. All of the formal institutions discussed play a role in ensuring accountability within democratic polities and play a role in ensuring democratic elections. Unfortunately, in Bangladesh, these institutions have too often failed in their role as watchdogs because of the infiltration of conflicting informal institutions in the form of personalized rule, patronage, corruption and clientelism, resulting in few electoral reforms, partisan electoral rules and weak implementation. According to Lauth, informal institutions are considered to have three types of relationships with formal institutions: complementary, substitutive and conflicting (Section 2.3.1.).<sup>8</sup> Conflicting informal institutions interfere with the functioning logic of formal institutions.<sup>9</sup> These informal institutions are dependent on the existence of formal institutions; they perpetuate by exploiting formal institutions for their own purposes by partially occupying or penetrating them. This thesis concludes that informal patterns of behavior interfere with the functioning logic of formal institutions in Bangladesh and conflict with how they are expected to frame and implement electoral laws as per constitutional and democratic norms. The thesis further shows that this leads to democratic erosion (as defined in the theoretical analysis undertaken for this PhD in Section 2.1.1.). By enacting electoral laws and implementing them in such a way that they are disadvantageous towards opposition parties, formal institutions lose credibility and opposition parties turn to informal mechanisms, such as street violence, to hold the government accountable. For example,

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<sup>7</sup> Levitsky and Helmke point to these three institutions as being usually studied only through the lens of the formal but being particularly vulnerable to informal institutions. See, Levitsky and Helmke, 'Informal Institutions and Comparative Politics: A Research Agenda', 5.

<sup>8</sup> Hans-Joachim Lauth, 'Informal Institutions and Democracy', *Democratization*, 7 (2000) 25.

<sup>9</sup> Lauth, 'Informal Institutions and Democracy', 25.

the 15<sup>th</sup> amendment to the Constitution did away with the Caretaker Government, resulting in opposition parties refusal to participate in elections as the Election Commission is seen to be under the executive's influence; or in the case of the 2006 voter list, the Election Commission compiled a voter list that included 13 million fake names in order to help the government rig the election. In both cases, the opposition turned successfully to the streets to have their voice heard. In addition to the case studies, the semi-structured interviews also highlighted how experts within the electoral field in Bangladesh (including politicians, NGO observers, lawyers, Election Commission officers and media personnel) view formal electoral institutions as having been compromised and as having failed to serve their purpose because of the infiltration of informal institutions. Those involved in the electoral process in Bangladesh confirm the author's contention that informal institutions within formal institutions get in the way of democratization.

This concluding chapter highlights the common findings in this thesis (each chapter presented a case study and analysis in relation to a different formal electoral institution) and reflects on the nature of formal and informal institutions in the electoral arena in Bangladesh. It shows that the observable outcome of each of the case studies is the enactment of exclusionary electoral laws, which are then implemented in an unequal manner. This has led to democratic erosion because opposition parties, civil society, voters and other actors lose trust in the ability of formal institutions to act as institutions of accountability. Lack of trust in formal institutions has led to an increase in the use of informal methods, such as political violence, in order to achieve desired results. The chapter concludes with some further thoughts on the partisan use of electoral laws and what this means for democratization in Bangladesh.

## 8.2. Observable Outcomes and Common Findings

While each of the case studies in this thesis analyzed a different formal electoral institution and highlighted various ways that informal institutions have manifested themselves, the common theme running through the case studies is that formal institutions have become politicized and the executive has too much influence on constitutionally separated formal institutions. This in turn has had an affect on electoral reform and implementation of electoral laws. The analysis of formal institutions both at the level of constitutional bodies (such as the Legislature, the Election Commission and the Judiciary) and secondary formal institutions and bureaucrats responsible for electoral law making and implementation (such as officials of the Election Commission or political party laws), have shown that informal norms and behavioral patterns infiltrate formal institutions. The expectation in a liberal democracy from representatives and democratic formal institutions of accountability is that they will work towards responding to and promoting public interest even in-between elections.<sup>10</sup> However, in Bangladesh many of the ‘rules of the game’ that guide the behavior of formal actors such as legislators, civil servants and the Judiciary are not found in the formal or written rules. Rather, informal incentives and constraints, ranging from norms of obedience to the party leadership, patronage and partisanship within institutions such as the Election Commission and the Judiciary, often shape actors’ behavior in a significant and systematic way. The observable outcome of informal institutions, as far as this research is concerned, is the increasing enactment of partisan and exclusionary electoral rules that make elections less accessible to opposition parties and the partisan implementation of electoral laws by public servants. This inevitably leads to less representation of the peoples’ interest in the political process.

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<sup>10</sup> Hanne Narud and Peter Esaiasson, ‘Between-Election Democracy: The Representative Relationship after Election Day’, (Colchester: ECPR Press, 2013) 2.

### ***8.2.1. Informal Institutions result in the personalization of electoral law making and law implementation***

An analysis of law making institutions, such as the Parliament and the Judiciary have shown that electoral reform and legislation has consistently been partisan and statist, and has given underlying advantage to the incumbent, throughout the democratic era (since 1991). Constitutional amendments in relation to the Caretaker Government provision show how the demand or rejection of the formal institution of the Caretaker Government has been dependent on political expediency and not public interest. The Caretaker Government has always been a demand of the opposition and resisted by the incumbent. It was the Awami League that initially rallied for the Caretaker Government system when it was in opposition, refusing to take part in the usual constitutional processes and going to the streets instead. However, in the end in 2014 it was an Awami League super-majority in Parliament that abolished the Caretaker Government System, without taking into account the full decision of the Supreme Court and with the backing of a Special Committee Report whose impartiality is questionable. The 15<sup>th</sup> amendment for all actual intents and purposes did away with the possibility of competitive elections in Bangladesh. Thus, electoral laws passed by the Parliament have been partisan and serve the purpose of the executive of the day (similarly, an analysis of the 14<sup>th</sup> amendment has shown how the Bangladesh Nationalist Party may have attempted to gain control over the Judiciary and the Caretaker Government by raising the retirement age of High Court judges as analysed in Section 5.4.). Thus, informal considerations and the willingness of the legislative to act as collaborators of the executive<sup>11</sup> (because of underlying informal institutions such as patronage and patrimonialism) has led to the enactment of formal rules that are personalized and partisan and affect democratic

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<sup>11</sup> John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and South African Perspective* (Cambridge: Cambridge University Press, 2004), 55, point out that the role of the legislative as collaborators of the executive is a common phenomenon in newer democracies (focusing on Africa) of the commonwealth.



competition in Bangladesh.

The analysis of the Judiciary and its role in development of electoral laws has shown it to be statist, resulting in electoral reform that suits the government of the day. The case study using the order on mandatory disclosure of candidates' information showed the willingness of the Judiciary to twice overturn its own decision under odd circumstances (First in the private Chamber of Justice Abedin on the last day that the court was in session, without notifying the original petitioners of the case. Second, following the original petitioner's submission and outcry in the court during the tenure of the Caretaker Government when the government's agenda was electoral reform). Thus, judicial development of electoral law has also been statist and taken into account the policies of the government of the day, thereby disadvantaging opposition parties. Patronage in judicial appointments and other institutional weaknesses, such as non-separation of the Judicial Pay Commission and Judicial Service Commission, may be the reason behind why the Judiciary has been particularly sympathetic to the needs of the executive.

In terms of implementation, the case studies used in this thesis also show how the existence of informal institutions result in partisan and distorted implementation of electoral rules. For example, the rules with regards to the electoral roll are clearly set out in the Constitution and through an act of Parliament.<sup>12</sup> Punishment and penalty in the form of imprisonment and fines are also prescribed in the law.<sup>13</sup> Yet, the case study of the 2006 voter list crisis illustrates how these formal rules are flouted and how Election Commission officers collude to give an advantage to the incumbent because of patrimonial relationships. All the actors, from high level Election Commissioners, to

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<sup>12</sup> Article 121, Constitution of Bangladesh and The Electoral Rolls Ordinance 1982.

<sup>13</sup> Section 18 and 19, The Electoral Rolls Ordinance 1982 (now S.18, 19 and 20 of The Electoral Rolls Act 2009).

mid-level Election Commission officials to lower level enumerators colluded to ensure that the voter list was tilted towards the executive, highlighting that informal institutions take precedence over the formal rules and change the incentives for actors who are responsible for ensuring equal application of the law. Similarly, in democratic polities, political parties are meant to nominate candidates whose policy preferences are fairly well understood and whose behavior can also be policed by the party.<sup>14</sup> However, the case study of candidate nomination by political parties point to the fact that for political parties in Bangladesh maintenance of patronage networks is more important than following formal rules and expectations with regards to candidate nomination, resulting in weakened implementation of nomination rules.

While the case studies are analysis of different formal institutions, the end result remains the same. Formal electoral Institutions in Bangladesh have been enacting electoral laws that give undue advantage to the incumbent and formal institutions have been implementing electoral laws in a partisan manner denying opposition parties justice and fairness. This thesis has argued that rule making and implementation becomes distorted because of underlying informal institutions.

### **8.3. Partisan and Politicized Electoral Reform: Further thoughts on the state of Elections and Democracy in Bangladesh**

The creation of an electoral regime that give the incumbent an advantage and the unequal implementation of electoral laws result in the loss of trust in formal institutions. This section concludes the thesis with a few thoughts on what unequal laws and unequal implementation of laws means for elections and democracy in Bangladesh. It highlights how the influence of informal norms within formal institutions are in fact leading to more informal patterns of behavior by forcing the opposition to turn away from formal

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<sup>14</sup> Strom, Muller and Bergman, 'Delegation and Accountability in Parliamentary Democracies', 63-64.

processes towards informal tactics of protest and violence.

### ***8.3.1 Election Rigging and Political Manipulation of the Election Commission***

Hossain notes that elections in democratic Bangladesh have not always been free and fair, 'in general vote-rigging takes place with the connivance of election officials and the administration'<sup>15</sup> (as evidenced in this thesis by the voter list case studies). Islam writes that 'the process of democratic consolidation in the country has ground to a halt on the issue of free and fair general elections'<sup>16</sup> – leading to parliamentary boycott, strikes, and political violence. Due to allegations of vote-rigging, losing parties in national elections have refused to take responsibility for their defeat, claiming that polls were rigged even when international monitors deemed voting mostly free and fair.<sup>17</sup> This has become the norm, fueling the confrontational mode of politics today.

Opposition political parties have consistently been accusing the government and the Election Commission of 'massive vote rigging' and 'deceiving voters and killing democracy by holding mock election(s)'.<sup>18</sup> The case studies in the thesis, such as the inflated voter list of 2006 or the 15<sup>th</sup> amendment (abolition of the Caretaker Government) point to clear attempts by the government and the Election Commission to give undue advantage to the incumbent. Successive governments have attempted to, often successfully, gain control over the Election Commission through patronage appointments. This has resulted in a loss of trust in elections in Bangladesh, leading to wholesale boycott of elections by opposition parties.

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<sup>15</sup> Akhter Hossain, 'Anatomy of Hartal Politics in Bangladesh', *Asian Survey*, 40 (2000) 508.

<sup>16</sup> Aminul Islam, 'The Predicament of Democratic Consolidation in Bangladesh', *Bangladesh e-journal of Sociology*, 3 (2006) 14.

<sup>17</sup> Mustafizur Rahman, 'The Origins and Pitfalls of Hartal Politics', *South Asian Survey*, 14 (2007) 107.

<sup>18</sup> Islam, 'The Predicament of Democratic Consolidation in Bangladesh', 13.

Opposition boycott of the electoral process has several consequences. Firstly, elections held without opposition participation are ‘flawed’ as defined by Pastor (please see Section 4.1.);<sup>19</sup> Secondly, Parliament becomes the plaything of the executive, and increasingly strong majorities lead to the passing of laws without any effective opposition or discussion; Third, apart from pre-electoral violence as a result of electoral boycott, the opposition’s absence from Parliament means that the forum for opposing the government becomes the street leading to increased violence; Finally, elections are no longer the method through which the government can be challenged and regime change can take place. Political parties begin to believe that politics of the street and the level of violence that a political party is able to inflict on the state results in successful change in government rather than participation within the formal processes. The requirement to mobilize leads political parties to put greater value on the clientelistic modes of maintaining loyalty and factional support and further sidelines formal institutions and processes (as seen in the candidate nomination case study).

### ***8.3.2 Politics of the Street***

Upon boycotting of elections, the most commonly used weapon in the hands of the opposition in Bangladesh are *hartals*.<sup>20</sup> *Hartal* is the most widely used means of registering opposition in Bangladesh<sup>21</sup> and *hartals* have been on the rise throughout the democratic era.<sup>22</sup> Although the original objective of holding a *hartal* had been to achieve goals in the

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<sup>19</sup> Robert Pastor, ‘The Role of Electoral Administration in Democratic Transitions: Implications for Policy and Research’, *Democratization*, 6 (1999) 58.

<sup>20</sup> As described in the literature review, *hartal* is a forced imposition by the opposition parties on the people to observe a total shutdown of every sector of the country such as transportation, offices, business activities, industrial production, banking and transactions to oppose the sitting government. Please see, Moniruzzaman, M. ‘Party Politics and Political Violence in Bangladesh: Issues, Manifestation and Consequences’, *South Asian Survey*, 16:1 (2009), 93.

<sup>21</sup> Islam, ‘The Predicament of Democratic Consolidation in Bangladesh’, 15.

<sup>22</sup> Mohammed Moniruzzaman ‘Party Politics and Political Violence in Bangladesh: Issues, Manifestation and Consequences’, *South Asian Survey*, 16 (2009) 93.

greater public and national interest,<sup>23</sup> during the parliamentary era of Bangladesh, the aims have deteriorated and *hartals* have become a tool of the opposition to express its rejection of the government and also to display its strength. Moniruzzaman states that ‘even intra-party factionalism results in clashes and *hartals* in today’s Bangladesh’<sup>24</sup> and goes on to quote William B. Milam’s poignant observation (United States Ambassador to Bangladesh between 1990-1993):

‘In Bangladesh the culture of “winner takes all” or absolute power in the hands of the executive has resulted in an attitude amongst politicians that “...winning is not just everything, it is the only thing...”. “Political leaders and their parties have had no inhibitions about creating crises of almost any nature and dimension to gain or regain office. No amount of money is too much to spend on political victory; no course of action is too immoral or illegal to achieve it; no amount of violence is too brutal to sustain it. For many years, Bangladeshi politics has resembled a bare-knuckle fight—bloody, vicious, without rules, and sometimes fatal”.’<sup>25</sup>

Political violence in Bangladesh is recurrent and has a cyclical order. As Moniruzzaman notes, ‘Unwillingness to concede or compromise on the part of the ruling party makes the opposition even more determined and violent. This is how the cyclical order of political violence has been maintained in Bangladesh during the last two decades’<sup>26</sup>. Devine asserts that violence goes hand in hand with democracy in Bangladesh and writes, ‘The particular way that democracy has evolved in Bangladesh.. is inherently linked with the emergence of new forms of violence... it is the organization of political life.. which gives shape and legitimacy to the articulation of violence in the formal

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<sup>23</sup> Sreeradha Datta, ‘Political Violence in Bangladesh: Trends and Causes’, *Strategic Analysis*, 29(2005) 432.

<sup>24</sup> Moniruzzaman, ‘Party Politics and Political Violence in Bangladesh’, 94.

<sup>25</sup> Moniruzzaman, ‘Party Politics and Political Violence in Bangladesh’, 95.

<sup>26</sup> Moniruzzaman, ‘Party Politics and Political Violence in Bangladesh’, 95.

political process.<sup>27</sup> For the first time, this thesis highlights how formal law making and law reform contributes to the cycle of violence in Bangladesh. As seen in this thesis, government sidelines the opposition through the use of partisan laws and law enforcement. As a result the opposition parties turn violent against the ruling party. The ruling party uses the state machinery to suppress the opposition's movements, which makes the opposition impose even greater demands upon the ruling party. And the end result is that accountability is based on the 'muscle' or organizational capacity of a political party.<sup>28</sup> Turnovers in government take place when opposition parties can organize and impose enough violence, whereby the state machinery can no longer suppress the opposition and the government is forced to pass laws enabling a fair election (as seen with the 13<sup>th</sup> amendment when the Bangladesh Nationalist Party was eventually forced to amend the Constitution and provide for a Caretaker Government in order to hold elections and in 2007 when emergency was declared and a Caretaker government backed by the army took over for two years).

### ***8.3.3. 'Muscle Men' and Political Violence***

The use of political strongmen known as '*mastaans*' has become a frequent phenomena in Bangladesh.<sup>29</sup> It is generally acknowledged by civil society and the public that all political parties have their own armed cadres.<sup>30</sup> The responsibility of these cadres is to maintain and strengthen the political base of the respective political party and to counter the cadres of rival parties. 'In the process, politics has become more reliant on muscle power, and a new breed of 'politicians' with money and armed support is increasingly replacing

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<sup>27</sup> Joseph Devine, 'Governance, Democracy and the Politics of Well-Being', *WeD Working Paper 36, ESRC Research Group of Well-Being in Developing Countries*, 2007, 24.

<sup>28</sup> Khan 'Class, Clientelism and Communal Politics in Contemporary Bangladesh'.

<sup>29</sup> Devine, 'Governance, Democracy and the Politics of Well Being'.

<sup>30</sup> The State of Governance in Bangladesh 2006, Center for Governance Studies BRAC University, 2006, 65.

old-fashioned politicians.<sup>31</sup> Chapter Seven of this thesis shows how the importance of maintaining ‘muscle’ for political parties leads to eschewed candidate selection and sidelining of formal electoral laws. Sobhan gives an account of how the ineffectiveness of party workers and the marginal rule of law have increasingly driven political parties towards extra-legal activities. In his words:

*‘The patronage extended by a political party to mastaans or hoodlums derives from the dependence of political figures on these forces to ensure their election and the retention of their political authority in their constituency area. Many politicians now increasingly use mastaans as a political resource in the contention for political office and state patronage to access public resources...Mastaans therefore play an integral part in the election process, and as a result both parties have tended to depend on such undemocratic instruments as political resources for realizing their electoral ambitions’.*<sup>32</sup>

The reason that political parties, particularly the opposition, have to turn to this type of violence is because of weakened formal institutions and law enforcement. The partisan use of formal institutions of accountability and the partisan implementation of law means that opposition parties cannot rely on the formal institutions and turn to informal institutions of clientelistic and factional politics, which in turn brings accountability to the streets.

The use of political strongmen and muscle politics has seen an associated rise in political violence since the mid-1990s. According to BRAC, ‘the (government), security forces and the opposition parties all violated their obligations under domestic and international law’,<sup>33</sup> using armed youth wings to perpetrate violence against opponents, conduct gun

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<sup>31</sup> Moniruzzaman, ‘Party Politics and Political Violence in Bangladesh’, 84.

<sup>32</sup> Rehman Sobhan, ‘Structural Dimensions of Malgovernance in Bangladesh’, *Economic and Political Weekly* (2004) 4105.

<sup>33</sup> BRAC, *The State of Governance in Bangladesh* 2006, 65.

battles, attack newspaper offices and journalists, and engaging in mob-violence that destroyed millions of dollars worth of property.<sup>34</sup> The report by BRAC also notes that evidence from the 2000s suggests that the situation has probably deteriorated. Moreover the state has recurrently adopted ‘extra-judicial’, ‘crackdown’ means of law enforcement such as the Rapid Action Battalion (RAB), created in 2004 through the Armed Police Battalions (Amendment) Act, mostly to suppress political opponents.<sup>35</sup> Extra-judicial killings and disappearances are on the rise in Bangladesh,<sup>36</sup> and every elected government has used the Judiciary and law enforcement agencies to detain *mastaans* in the service of the opposition while granting amnesty to their own. This marginalization of the opposition, because of the failure of formal institutions to provide rule of law, leaves the opposition no choice but to resort to politics of the street and greater violence leading to democratic corrosion.

During an interview with a Member of Parliament this author was told:

*This culture is unfortunate. I think a large reason for this is that the prevalent mentality is of only winning. The fact that you can still contribute a lot by being in the opposition in the Parliament, this we don't even know. We think that the only person who can contribute in the development of the country is the government and the opposition has no role. That is one side. On the other side, government also doesn't want to allow opposition to do a lot of things. During BNP's tenure we were not allowed to do any work, or do any work in our constituency... there was an attitude that don't do any work in an AL constituency... that's why everyone wants to come to power.*<sup>37</sup>

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<sup>34</sup> BRAC, The State of Governance in Bangladesh 2006, 65.

<sup>35</sup> BRAC, The State of Governance in Bangladesh 2006, 65.

<sup>36</sup> Human Rights Monitoring Report, Odhikar, Dhaka, January 2015.

<sup>37</sup> Interview J.



Thus, we see a cyclical trend whereby the government of the day manipulates institutions of accountability in order to sideline and harass the opposition. The opposition becomes impotent and in turn takes to the street and gives the government further grounds to establish extra-judicial mechanisms of control. At the bottom of electoral manipulation and politics of the street is the requirement for political parties to stay in power. The ‘zero sum’ attitude to elections is a result of the culture of patronage-based relationships in Bangladesh, to maintain which requires access to state resources as described in Section 2.3. Eventually, the conflict with ingrained informal institutions is the key reason behind formal institutions of democracy remaining ineffective in Bangladesh.

#### **8.4. Conclusion: Politics of the Street more Successful than Formal Democratic Institutions in Bangladesh**

The culture of moving politics from the Parliament and other formal institutions to the streets has always proven to be more successful in bringing about change in Bangladesh than formal democratic institutions. The fall of Ershad’s regime was brought about by the use of *hartals* that led to extensive violence and resulted in hundreds of casualties among activists and law enforcement agents<sup>38</sup> (as described in Section 1.2.2. and 1.2.3.). Since then, and throughout the democratic era (since 1991) the potency of street power has been highly visible.<sup>39</sup> It was a sustained opposition campaign in the form of street marches, demonstration and strikes, which finally led to Khaleda Zia annulling the election of 1996 and introducing the Caretaker Government system (as detailed in Sections 1.2.3. and 5.3.). Since then every Parliament has seen boycotts by the opposition followed by months of street agitation prior to elections. According to some estimates, during 1991-96, when the Bangladesh Nationalist Party was in power the Awami League organised 173 days of *hartals*. During the Awami League tenure between 1996-2001, the

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<sup>38</sup> Datta, ‘Political Violence in Bangladesh: Trends and Causes’, 432 – 433.

<sup>39</sup> Datta, ‘Political Violence in Bangladesh: Trends and Causes’, 432 – 433.

Bangladesh Nationalist Party retaliated by 85 days of work stoppage. The protests and violence perpetrated by the opposition in 2006 led to the declaration of the state of emergency in 2007. And finally, prior to the 2014 election, the country saw the highest number of political violence related deaths ever.<sup>40</sup>

The success of street politics in Bangladesh has made it an ingrained part of the politics of the country. *Hartals* have become a common instrument for political parties to press for their demands and ‘Various political parties depend on them for their growth, thrive on such street power and in the process contribute to violence in the society.’<sup>41</sup> During an interview with an Awami League Member of Parliament, this author was told that the history of violent politics and its success in the region goes much further:

*But who are our politicians today? They are born out of agitational politics. Who are the leaders of Bangladesh Nationalist Party and Awami League today? They are the ones who became leaders by agitating against Ayub Khan. So psychologically what have they seen?... that we are the product of an agitation. So in the process of solving a problem they quickly move on to an agitational kind of results.*<sup>42</sup>

While this sort of historical, path-dependent explanations of political violence is available within the literature on Bangladesh, there is very little literature explaining political violence and democratic degradation as a result of formal institutional weakness that leads to exclusionary laws and partisan implementation. The author has argued that this distortion of rule making and the rule of law is one of the main reasons behind flawed elections and forcing political parties to the street. This thesis is a first step towards analyzing democratization in Bangladesh through the lens of the law- how law making,

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<sup>40</sup> ‘Democracy in the Crossfire: Opposition Violence and Government Abuses in the 2014 Pre and Post Election Period in Bangladesh’, Human Rights Watch, 2014.

<sup>41</sup> Datta, ‘Political Violence in Bangladesh: Trends and Causes’ 433.

<sup>42</sup> Interview J.

law reform and law implementation lead to political violence and democratic degradation. This thesis has shown that electoral reforms have been exclusionary and partisan because of the existence of informal institutions, and have forced opposition parties to the street. It is the researcher's hope that the dissertation may form the basis of further study on how law reforms and enforcement affects democratization in Bangladesh.

## **8.5. Thoughts on the Future and Recommendations**

This thesis concluded that political violence and street power are the solutions that opposition parties have historically turned to in Bangladesh, and will probably continue to turn to in the near future given the exclusionary nature of Parliament and other formal institutions. In this final section the researcher attempts to reflect on avenues other than political violence, to come out of the current political deadlock. The thesis points to three different scenarios that could provide a non-violent path towards reform and fresh elections. It begins with a discussion on the possibility of civil society movement becoming successful in holding fresh elections. The researcher explains that given the political climate in Bangladesh today, it is unlikely that such a movement can be mobilized. However, where change is necessary and could lead to long-term positive differences is through constitutional reform and judicial independence. The possible scenarios that are discussed here, and that may be able to end the current political crisis in Bangladesh include: (i) mobilization by civil society leading to fresh elections under an interim and non-partisan government; (ii) Constitutional reform through a non-partisan amendment process; and (iii) a free and independent judiciary.

### ***8.5.1. Civil Society Led Political Change***

While discussing the role of civil society in upholding the Constitution and preserving democracy, Hatchard and Ogowewo write that ‘Perhaps the greatest bulwark against unconstitutional change of government lies in the determination on the part of all sections of civil society to defend their Constitution against those seeking to undermine it.’<sup>43</sup> The duty of citizens to resist ultra vires tampering with the Constitution, particularly unconstitutional change of government, is provided within the Constitutions of a number of emerging democracies, including Uganda and Ghana.<sup>44</sup> The Bangladesh Constitution has no such provision. However, Bangladeshi civil society and grassroots mobilization by civil society is recognized as having been responsible for the preservation of democracy whenever unconstitutional or undemocratic government’s have grasped power in the past.<sup>45</sup> Zafrullah and Rahman point to the key role of civil society at all the defining moments in Bangladesh’s political history from the end of colonial rule (1947), to the language movement in 1952, to the struggle for autonomy (1969) and the war of independence (1972) and resistance against Ershaad’s rule in the late eighties.<sup>46</sup> More recently, during the democratic era (since 1991), Devine notes that civil society (particularly NGOs) played an ‘active’ role in successfully mobilizing people to support the calls for fresh election and elect the Awami League in 1996.<sup>47</sup> Civil society also had a role to play in the cancellation of elections and the takeover by the Caretaker Government in 2007 because it was the writ petitions filed as Public Interest Litigation that eventually led to the wholesale rejection of the Election Commission and the Voter List (See S. 4.3).

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<sup>43</sup> John Hatchard and Tunde Ogowewo, *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth* (London: Commonwealth Secretariat, 2003), 174.

<sup>44</sup> Hatchard and Ogowewo, ‘Tackling the Unconstitutional Overthrow of Democracies’, 175.

<sup>45</sup> Civil Society for the purpose of this discussion may be defined as the ‘third sector’ distinct from government and business. These are intermediary institutions and include NGOs, community and social groups, media, professional associations, trade unions, self-help groups, social and political movements, advocacy groups and the like.

<sup>46</sup> Habib Zafrullah and Habibur Rahman, ‘Human Rights, Civil Society and Non-Governmental Organizations: The Nexus in Bangladesh’, *Human Rights Quarterly*, 24 (2002) 1013.

<sup>47</sup> Joseph Devine, ‘NGOs, Politics and Grassroots Mobilisation’, 83-84.

Given the active role that civil society has played time and again in bringing about political change and promoting democracy and constitutionalism in Bangladesh, one avenue out of the current political crisis may be if civil society united once again (such as in the late 80s and mid-90s) and managed to mobilize the grassroots in demanding fresh elections under an interim government acceptable to all political parties. However, in the context of Bangladesh's current political climate it is an unlikely scenario that civil society will be able to successfully step in and mobilize as it has done in the past. The researcher contributes the reason behind increasingly weak civil society in Bangladesh to the clamp down on dissenting voices by the government and to the fractures within civil society as a result of conflicting ideologies that have resurfaced with the constitution of the International Crimes Tribunals.<sup>48</sup>

#### ***8.5.1.1. An increasingly intolerant government/ Clamp Down on Critics***

There is increasingly limited space for civil society in Bangladesh. Government strong-arming and attempts to limit civil society space is evident in the recent cases against and detention of media persons who have spoken against the government. For example on February 6, 2016, while speaking on a television talk show, the editor of The Daily Star expressed regret about publishing certain corruption related reports about Sheikh Hasina

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<sup>48</sup> Besides government clamp down and internal fractures within civil society, the rise of fundamentalist Islam and violence associated with these groups also plays a role in suppressing dissent of all forms. In the past few years Bangladesh has seen a dramatic rise of attacks on secular voices, particularly bloggers, by unidentified Islamic militants. Since the beginning of 2015 to date there have been nine secular minded bloggers and activists who have been murdered. The government's reaction to the murders has been to warn citizens to not hurt Islamic sentiments through their words and writings rather than any serious measures to try and prevent such attacks. The widespread fear of expression of thought has a consequence for how effectively civil society may be able to mobilise on any front – including mobilization to hold fresh elections and a path out of the current political crisis. The researcher decided to not go into a discussion of the rise of radical Islam in this final section of the thesis because it is not directly related to the development of electoral reform, but rather does have consequences for the ability of civil society to mobilize.

during the 2007-2008 Caretaker Government.<sup>49</sup> Mahfuz Anam claimed that these stories were given to the Daily Star by the Director General Forces Intelligence (DGFI) during the tenure of the army-backed Caretaker Government in 2007 and expressed regret that the newspaper failed to verify the reports. Since then, 79 court cases have been filed against Mahfuz Anam with charges ranging from defamation to sedition.<sup>50</sup> While the ruling party denies responsibility for filing the cases, in many instances it is Awami League leaders and activists who have filed the cases.<sup>51</sup> If Mahfuz Anam were to be convicted in all the cases he would face a prison term of over 175 years. The cases have also been filed all over the country in 50 of the 64 judicial districts, requiring the editor to travel all over the country seeking bail. If he is required to be present in two jurisdictions at the same time, it is likely he would be denied bail by the court he is not present at.

Besides Mahfuz Anam, dissenting voices in general have been attacked through arrests and the filing of arbitrary cases on vague grounds. For example, the administrator of the satirical website 'Moja Loss?' was arrested on December 10, 2015 on charges of 'spreading anti-state propaganda'.<sup>52</sup> In a more bizarre move, prominent magazine editor Shafik Rehman has recently been arrested on suspicion of sedition and police have said that there is evidence linking him to a conspiracy to murder the son of Sheikh Hasina.<sup>53</sup> Besides arresting and filing cases against media personnel, freedom of speech has also largely been affected by government moves such as shutting down Facebook and other

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<sup>49</sup> 'Daily Star Editor Mahfuz Anam Admits to Publishing DGFI-fed baseless stories', *bdnews24.com*, 2 April 2016.

<sup>50</sup> 'More cases, Summons against Mahfuz Anam', *The Daily Star*, 23 February 2016.

<sup>51</sup> 'More cases, Summons against Mahfuz Anam', *The Daily Star*, 23 February 2016.

<sup>52</sup> 'Moja Loss?' Admin Arrested, *Dhaka Tribune*, 10 December 2015.

<sup>53</sup> 'ASK concerned over Shafik Rehman's Arrest', *The Daily Star*, April 18 2016.

social media sites.<sup>54</sup> This type of clampdown means that mobilization by civil society around a free and fair election is threatened because of the fear of arrest and detention.

Hatchard and Ogowewo suggest that one way to encourage civil society action and to protect civil society from this type of harassment is to insert a 'Duty to Resist' provision into the Constitution.<sup>55</sup> If citizens are given the right and duty to protect the Constitution then civil society may be more encouraged to speak up against those trying to undermine the Constitution. Further, if such resistance by civil society in order to uphold the Constitution is a recognized duty and punishment for it is ultra vires then it is more likely that civil society will take action. The reason behind a 'resistance' provision is to give moral support and encouragement to civil society to resist, whether it is in the form of civil disobedience, media independence or non-cooperation. Bangladeshi civil society has always been active in resisting usurpers and protecting the Constitution, however, recent crackdown by the government as evidenced by the above examples, may mean that further constitutional protection of civil society is required.

#### 8.5.1.2. A fractured Civil Society

Apart from government harassment, civil society itself has become more fractured than ever before because of the conflict over ideology that has resurfaced as a result of the International Crimes Trials.<sup>56</sup> The International Crimes Tribunals set up in 2009 over 40 years after the war for independence has come to symbolize the liberation era sentiments of nationalism. Critics of the trials, the verdicts or the process are seen to be pro-Jamaat and anti-liberation. This has meant that anyone criticizing the process of the war crimes

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<sup>54</sup> 'Social Networking Sites closed for security reasons, says Minister Tarana Halim', *bdnews24.com*, 18 November 2015

<sup>55</sup> Hatchard and Ogowewo, 'Tackling the Unconstitutional Overthrow of Democracies', 174-178.

<sup>56</sup> Naming the tribunals International Crimes Tribunals has raised some concerns as the tribunals are entirely domestic in nature.

trials has been called out as ‘pro-Jamaati, a lobbyist for the Jamaat, paid by the Jamaat, a supporter of war criminals or some other combination of the words Jamaat, war criminal, lobbyist and money’<sup>57</sup> not only by the government but by other sections of civil society and liberals as well.

The defamation attached with questioning the war crimes trials has meant that there is little debate about the nature and quality of the proceedings and also that mainstream civil society has distanced itself from those sections that have questioned the proceedings. This split has become so deep that this researcher has attended social events in Dhaka where supporters of the trials and those seen to question the process refused to sit together at dinner. This split between the supporters of the war crimes trials and those questioning the process means that civil society is unable to unite on other fronts as well, and it is unlikely that Bangladesh will see civil society mobilization with regards to fresh election in the near future.

The combination of the two factors discussed here (plus the issues that have arisen with the rise of radical Islam; please see Footnote 48 above) means that there is little possibility of civil society mobilizing to bring about constitutional reform and fresh election in the near term. Without civil society movement creating enough pressure from outside the government to bring about change, only one non-violent avenue remains to bringing about long-term change to the state of democracy and governance in Bangladesh.<sup>58</sup> This avenue is through constitutional reforms in order to make the political system more conducive to opposition participation in elections.

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<sup>57</sup> David Bergman, ‘The food minister, defamatory allegations, and the International Crimes Tribunal’, <[www.bangladeshwarcrimes.blogspot.co.uk](http://www.bangladeshwarcrimes.blogspot.co.uk)> 6 March 2016.

<sup>58</sup> It is the researchers contention that movement by opposition parties will necessarily entail street politics and violence. Please see S. 8.3.2 and 8.3.3.



### *8.5.2. Constitutional Reform*

It is said that the greatest threat to good government is unaccountable government.<sup>59</sup> The Constitution has a special place in ensuring government accountability and limiting the government and therefore constitutional provisions, constitutional reform and constitutional amendments require special safeguards. In Bangladesh constitutional amendments require a specially enhanced parliamentary majority (SEPM) (as discussed in detail in S.5.2.). However, Hatchard et al argue that legislatures are generally ill-suited to playing a guardianship role because in dominant-party states the ruling party often has control over the members of Parliament and Parliament essentially becomes a rubber stamp for all ruling party proposed constitutional amendments.<sup>60</sup> Chapter Five discussed how the process of constitutional amendments in Bangladesh have become distorted because of stronger majorities in Parliament and amendments to the Constitution have consistently been passed in order to serve the interests of the ruling party. In this section the thesis discusses possible safeguards within the Constitution that may ensure that constitutional institutions and electoral reform do not serve partisan interest. The next section will discuss the role the Judiciary can play in ensuring that these constitutional safeguards are adhered to.

Bangladesh has a two-third majority requirement for constitutional amendments, judicial recognition of the 'basic structure' doctrine and more recently in a disturbing move the insertion of an 'ever-lasting' or 'unamendability' clause through the 15<sup>th</sup> amendment to

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<sup>59</sup> Hatchard and Ogowewo, 'Tackling the Unconstitutional Overthrow of Democracies', 9.

<sup>60</sup> Hatchard, Ndulo and Slinn, 'Comparative Constitutionalism and Good Governance in the Commonwealth', 43-48.

the Constitution.<sup>61</sup> This thesis has argued that constitutional amendments in Bangladesh have served the partisan requirements of ruling parties using the Caretaker Government provision as a case study. Given the nature of the 15<sup>th</sup> amendment that removed the Caretaker Government provision and inserted an eternal clause, it is extremely important that the ability to amend the Constitution to undo unscrupulous amendments be retained. Hatchard et al strongly argue that ‘there is an “inherent right” to amend a constitution in order to “perfect imperfections” and to strengthen its provisions where necessary’.<sup>62</sup> However, an exclusively parliamentary process to amend the Constitution can lead to unscrupulous amendments – and we have seen this happen in Bangladesh. The following are some methods of strengthening the amendment process suggested by Hatchard et al and that Bangladesh could adopt in order to protect the Constitution.<sup>63</sup> Adoption of such provisions may prevent in the future the type of political crisis Bangladesh is experiencing today.

#### ***8.5.2.1. Alternative Types of Majority Approval***

One possible way of safeguarding constitutional amendments from being hijacked by ruling party majorities in Parliament is to require ‘all party parliamentary support’. This

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<sup>61</sup> The 15<sup>th</sup> amendment to the Bangladesh constitution inserted article 7B into the Constitution in 2011, which provided that the ‘basic provisions of the Constitution’ would be unamendable. While many modern constitutions include eternal clauses, unlike these constitutions article 7B does not provide any principle features that should be unamendable. Rather, it refers to a lengthy list of “provisions” as unalterable: the preamble of the Constitution, all fundamental principles of state policy, all fundamental rights provisions, and “the provisions of articles relating to the basic structures”. Ridwanul Hoque writes that article 7B ‘when interpreted literally, renders the whole of the constitution unamendable.’ Given the nature of the 15<sup>th</sup> amendment (please see Chapter 5) it seems likely that the government possibly inserted the eternal clause in order to ensure that the courts could not disturb the amendments it had inserted into the Constitution, including removal of the Caretaker Government.

<sup>62</sup> Hatchard, Ndulo and Slinn, ‘Comparative Constitutionalism and Good Governance in the Commonwealth’, 44.

<sup>63</sup> The constitutional and institutional reform recommended in the final sections of this thesis is heavily reliant on the writings of Professor John Hatchard. While Hatchard writes in relation to the Commonwealth, particularly African nations, the researcher felt that given Bangladesh’s transition to democracy, struggle with separation of powers and a dominant executive, the solutions suggested by Professor Hatchard (in his role both as scholar and consultant for the Commonwealth) are very suitable for Bangladesh.

would require the majority of the members of the ruling party along with the majority of the members of the main minority parties to support the amendment. The advantage of this method is that it requires a wider range of political opinions to agree and increases the requirement for the ruling party to debate and defend the amendment in the House. Most importantly, this method brings the Constitution above partisan politics and promotes a genuinely consensual approach to constitutional reform. Another way of improving the legislative approach to constitutional amendments is to introduce a second chamber. The second chamber method maybe strengthened by giving the second chamber powers of veto or requiring a national referendum in case the amendment does not pass in the second chamber.

#### 8.5.2.2. Constituent Assembly Approvals

Constitution making through popular participation is seen to be the best way to draft a Constitution. Similarly, requiring the approval of a Constituent Assembly made up of a cross-section of civil society is another way of ensuring that popular sentiment is reflected in the constitutional amendment process. While this may be a lengthy and expensive process, in Bangladesh where constitutional amendments have not always been passed to reflect the ‘will of the people’ this process may provide an avenue for public participation and consultation in the amendment process.

#### 8.5.2.3. Approval through a National Referendum

Another practice that could protect the Constitution is requiring a national referendum. This practice has proved successful for some African states.<sup>64</sup> Even when a government is confident of getting a two-third majority in Parliament, it may not be able to pass any

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<sup>64</sup> In 1996, the Zambian government sought to amend the 1991 Constitution. However, there was a requirement that a national referendum had to be held in order to amend any fundamental rights provision. Thus, the Zambian government did not attempt to make changes to the Bill of Rights. See, Hatchard, Ndulo and Slinn, ‘Comparative Constitutionalism and Good Governance in the Commonwealth’, 52.

amendment it wants to as easily in a national referendum. Bangladesh had a requirement for a national referendum for amendments to certain provisions of the Constitution until 2011.<sup>65</sup> The 15<sup>th</sup> amendment did away with these requirements, controversially without sending the amendment Bill to referendum. Retention of Article 142 or a provision that requires certain amendments to be approved through a national referendum may be able to safeguard the Constitution unless the government ignores the provision, as was the case with the 15<sup>th</sup> amendment.

#### 8.5.3.4. Publicizing the Proposed Amendments

Another method by which the Constitution can be safeguarded from untoward amendments is through having provisions that require the publication of proposed amendments in government gazettes. Public awareness of proposed amendments before Parliament passes the Bill would promote discussion and dialogue and also make clear whether an amendment is popular or suffers from lack of mandate. If Bangladesh had such a provision, it would have been difficult to pass the 15<sup>th</sup> amendment and delete the provision of a Caretaker Government because most people wanted the 2014 elections to be held under a Caretaker Government,<sup>66</sup> and perhaps this discontent would have been clearer if the draft Bill had been published.

Any of the above discussed methods or a combination of such methods (such as publication of the draft Bill and requiring approval from a constituent assembly) would have prevented the current political crisis that Bangladesh faces. However, given that it is unlikely that the present government will incorporate any of these recommendations into

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<sup>65</sup> Article 142 of the Constitution required an affirming referendum for amendments to: preamble of the constitution, article 8 (“fundamental principles”), article 56 (parliamentary nature of government), and article 142 (amendment rules of the constitution).

<sup>66</sup> ‘Majority Voters want Caretaker Government’, *The Dhaka Tribune*, 13 February 2014.

the Constitution, this thesis will now turn to the final place of hope for change in Bangladesh, that is the Judiciary.

### ***8.5.3. Constitutional Reform and the Role of the Judiciary***

An impartial judiciary is fundamental to rule-based governance and to sustaining a culture of accountability rather than impunity. As Hossain Mollah notes, a dysfunctional judiciary impacts society more severely than any other dysfunctional institution, as it removes a forum for social grievance and reduces social attachment.<sup>67</sup> Particularly, the judiciary holds a special place in protecting the constitution and the constitutional rights of the people. With powers of judicial review, basic structure doctrines and judicial activism as a result of public interest litigation, the Bangladesh Judiciary, at least on paper, has a lot of potential to hold the executive accountable. Yet, the powers of the judiciary become meaningless unless independence and a willingness to hold the executive accountable are real.

With a view to ensuring separation of powers and a Judiciary willing to impose checks and balances, the Bangladesh Constitution requires that the state shall ensure the separation of the Judiciary from its executive organs. Article 22 guarantees the independence of all judicial officers unconditionally and then addresses the methods of appointment of the Judiciary. The Judiciary's ability to hold the legislature and the executive in check is further strengthened by the 'basic structure' jurisprudence, which the Bangladesh Supreme Court has been following since 1989. The basic structure jurisprudence gives the courts the power to annul any constitutional amendment that changes the basic features or structures of the Constitution (please see S. 5.5.1). Besides

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<sup>67</sup> Awal Mollah, 'Separation of the Judiciary in Bangladesh: An Overview', *International Journal of Law and Management*, 54 (2012) 61-77.

the basic structure jurisprudence, since 1996, the High Court liberalized the requirement of *locus standi* opining that a liberal interpretation of the Article 102 phrase “a person aggrieved” should be taken based on the indigenous nature of the Constitution, which was not the outcome of a negotiation with a colonial power but the result of a war of independence fought by the people for a common cause.<sup>68</sup> Thus, the ambit of Article 102 could not be limited to a narrow understanding of an ‘aggrieved person’ but must be read in a way to expand the concept of *locus standi* and the constitutional mandate for social justice and judicial consciousness. Hossain writes:

*The Judiciary has been promoting social change through rights friendly interpretations of the Constitution... The increasingly positive attitude of the Judiciary towards public interest litigation, overcoming earlier inhibitions, which had constrained the role of the judiciary, has enabled the judiciary to play a dynamic role in facilitating and promoting social change.*<sup>69</sup>

The combination of the basic structure jurisprudence and the liberalization of *locus standi* give enormous powers to the Judiciary to legislate through judicial review and make policy decisions through public interest litigation. Although there are concerns about the proper role of the Judiciary and the rise of ‘juristocracy’ when the courts invoke the power of judicial review to legislate and make policy decisions that could be seen to impinge on the role of the executive and the separation of powers,<sup>70</sup> Hatchard et al argue that in the context of poverty, illiteracy and government abuse of power it is necessary to

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<sup>68</sup> Dr. Mohiuddin Farooque v Bangladesh IX (1996) Bangladesh Supreme Court Report 27.

<sup>69</sup> Kamal Hossain, ‘The Role of the Judiciary as a Catalyst for Social Change’, <<http://www.supremecourt.gov.pk/ijc/Articles/9/3.pdf>> Accessed on 3 May 2016.

<sup>70</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, (Massachusetts: Harvard University Press 2004) 1.

have a liberal approach to *locus standi* because those whose rights ‘are allegedly trampled upon must not be turned away from the court by procedural hiccups’.<sup>71</sup>

Given the wide range of powers that the Bangladesh Judiciary has, it could potentially play an active role in holding the executive accountable and in preventing unscrupulous constitutional amendments, such as the 15<sup>th</sup> amendment (removal of the Caretaker Government) that has led to the current political crisis. Yet, as discussed in Chapter 6 the Judiciary failed to take the executive on and has generally been statist in its decision-making. This thesis has used the mandatory disclosure of candidates’ information case as a case study to demonstrate how judicial decision making with regards to electoral reform have been statist and the 13<sup>th</sup> amendment judgment shows how the Supreme Court was only willing to go so far as to give directions to hold the next two elections under the Caretaker Government system but was unwilling to compel the executive, despite quoting the principles *quod alias non est licitum* (that which is not otherwise lawful, necessity makes lawful), *salus populi suprema lex* (safety of the people is the supreme law) and *salus republicae est suprema lex* (safety of the State is the supreme law).<sup>72</sup>

Chapter 6 provided an overview of the independence of the Judiciary, the Bangladesh Judicial Service Commission and the judicial appointment process. It traced lack of judicial independence to patronage-based appointment of judges. Section 6.2.3 illustrated that judges are increasingly being appointed because of political connections and this has resulted in a general decline in the quality of judges and the level of their education, experience and independence. The crux of the issue is that the executive has too much authority in Bangladesh in the appointment of judges. While the Constitution provides

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<sup>71</sup> Hatchard, Ndulo and Slinn, ‘Comparative Constitutionalism and Good Governance in the Commonwealth’, 176.

<sup>72</sup> Re: Constitution of Bangladesh (13<sup>th</sup> Amendment Act Case) ADC Vol. IX (A) (2012).

for an independent Judiciary, appointments are almost entirely in the hands of the executive. The following are some suggestions on how to strengthen the Judiciary. If such protections are instituted, Bangladesh may see a decline in patronage within the Judiciary and thus an independent enough Judiciary that may be able to hold the executive accountable and provide a way out of the current political crisis. Given that constitutional reform that would allow for independent institutions and a solution to the current electoral crisis is unlikely to come from the legislature, the Judiciary remains the only way forward for Bangladesh.

#### 8.5.3.1. The Appointment Process<sup>73</sup>

The first step towards an independent Judiciary that is able to hold the executive accountable is to ensure that judicial appointments are not politicized so that judges do not feel they owe anything to those appointing them. According to Hatchard et al, the best way to ensure a transparent appointment process is to have both a constitutional guarantee of judicial independence and a Judicial Service Commission with membership from both the senior judiciary and other sections of civil society (including the wider legal community and academics).<sup>74</sup> Further, the Judicial Service Commission should be able to draw candidates from a wide pool both by nominating candidates and by advertising for judicial candidates.<sup>75</sup> S. 6.2.2. gave an overview of the appointments process in Bangladesh and showed that Bangladesh has a constitutional guarantee of judicial independence, a Judicial Service Commission made up of judges and members from other sectors and a requirement that regular judges of the Supreme Court of

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<sup>73</sup> S. 6.2.1. of the thesis provides an overview of the Judicial Service Commission and appointments to the lower courts. In this final section I have only touched on the appointment process to the High Court and suggestions for improvement only in the appointment to superior courts, as these are the judges involved in judicial review and protection of the Constitution.

<sup>74</sup> Hatchard, Ndulo and Slinn, 'Comparative Constitutionalism and Good Governance in the Commonwealth', 152-154.

<sup>75</sup> Hatchard, Ndulo and Slinn, 'Comparative Constitutionalism and Good Governance in the Commonwealth', 152-154.



Bangladesh are appointed by the President in consultation with the Chief Justice. Yet there is patronage and politicization in the appointment process. The first issue with the appointment process in Bangladesh is that the President simply needs to ‘consult’ the Chief Justice but there is no requirement to act on the advise of the Chief Justice. Hatchard et al call the ‘consultation’ formulation the weakest formulation because the President is not bound by the advise of the Chief Justice.<sup>76</sup> Further, in Bangladesh the executive has overcome even the weak safeguard of ‘consultation’ through the appointment of additional judges to the High Court. There is no requirement of consultation with the Chief Justice when appointing additional judges, and successive governments have found it expedient to appoint increasing numbers of additional judges (Please see Figure 1).

As far as the Chief Justice is concerned, Article 95 of the Constitution leaves the appointment of the Chief Justice entirely up to the President. This is unsatisfactory and as described in S. 6.2.3. has led to the superseding of the most senior judge for the position of Chief Justice, when the judge seemed unsuitable to the executive, despite being qualified. Hatchard et al write that given the ‘high profile and key constitutional role played by the Chief Justice’, to leave his or her appointment entirely up to the President is ‘quite unsatisfactory’<sup>77</sup> and Hatchard writes, ‘the president cannot have unfettered choice as to the appointee (Chief Justice)’<sup>78</sup> and goes on to suggest an appointment process for the Chief Justice in which the Judicial Service Commission is

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<sup>76</sup> Hatchard, Ndulo and Slinn, ‘Comparative Constitutionalism and Good Governance in the Commonwealth’, 155.

<sup>77</sup> Hatchard, Ndulo and Slinn, ‘Comparative Constitutionalism and Good Governance in the Commonwealth’, 157.

<sup>78</sup> John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa*, (Cheltenham: Edward Elgar Publishing Limited, 2014) 209.

closely involved.<sup>79</sup> Another way to ensure that the appointment of the Chief Justice is not politicized is to impose rigorous qualification standards.<sup>80</sup> The appointment of a Deputy Chief Justice to act in the Chief Justice's absence is also advisable, so that the executive do not feel that pressurizing a Chief Justice to resign will immediately put a candidate of their choice in the seat.<sup>81</sup>

The best way to strengthen the Judiciary and ensure that it is capable of holding the executive in check, particularly in relation to constitutional reform, would be to bind the President to the advise of the Chief Justice in the appointment of both regular judges of the Supreme Court and additional judges of the High Court. If it is thought that the President should have a stronger role in judicial appointments than merely accepting the advise of the Chief Justice, then a solution would be for the Chief Justice/Judicial Service Commission to provide a shortlist of candidates from whom the President chooses his or her preferred candidate(s). A final suggestion by Hatchard et al is that the appointment of High Court judges requires ratification by the Legislature.<sup>82</sup> But given the stronghold of government parties in Parliament as a result of strong majorities, this would not provide much safeguard in Bangladesh.

#### **8.5.3.2. Security of Tenure**

One of the best ways to ensure that judges do not feel the need to do the bidding of the executive is to guarantee them security of tenure. If judges have to renew their contracts then there is the fear that unpopular decisions, especially judicial review decisions, may

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<sup>79</sup> See, Hatchard, Ndulo and Slinn, 'Comparative Constitutionalism and Good Governance in the Commonwealth', 157 and Hatchard, 'Combating Corruption', 209 -211.

<sup>80</sup> Hatchard, Ndulo and Slinn, 'Comparative Constitutionalism and Good Governance in the Commonwealth' 157.

<sup>81</sup> Hatchard, Ndulo and Slinn, 'Comparative Constitutionalism and Good Governance in the Commonwealth', 157.

<sup>82</sup> Hatchard, Ndulo and Slinn, 'Comparative Constitutionalism and Good Governance in the Commonwealth', 156.

lead to political pressure to block the renewal of a particular judge's contract. Article 96 of the Bangladesh Constitution confirms that judges will hold their position until the age of 67, unless the President backed by a Parliamentary two-third majority in Parliament removes a judge on the ground of proven misbehavior or incapacity (Please see S. 8.5.3.4. below for a discussion of removal proceedings).<sup>83</sup>

#### **8.5.3.3. Financial Autonomy**

'Financial autonomy (of the Judiciary) is fundamental. Without it, the executive can seriously impact on judicial independence by limiting the judiciary's access to the funds voted to it by Parliament and/or by assuming control of the services and staff upon which the judiciary depends.'<sup>84</sup> In Bangladesh, the Masdar Hossain decision (See S. 6.2.1 for details) required the establishment of financial autonomy of the Supreme Court whereby 'The executive government shall not require the Supreme Court of Bangladesh to seek their approval to incur any expenditure on any item from the funds allocated to the Supreme Court in the annual budget, provided that the expenditure incurred falls within the limit of sanctioned budgets'.<sup>85</sup> Further, it required the establishment of a Judicial Pay Commission that would review the pay, allowances and other privileges of the judicial service.<sup>86</sup> This allows for a certain level of financial autonomy. However, the Supreme Court is still dependent on the executive branch as budget allocation to meet the expenses of the Supreme Court is made by the relevant ministry, and this remains a stumbling block to the full autonomy of the Judiciary.<sup>87</sup> Perhaps a solution to this would

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<sup>83</sup> Since 5 May 2016 the Supreme Judicial Council for the investigation of judge's conduct has been re-established because the High Court declared the 16<sup>th</sup> amendment (that gave powers to Parliament to remove judges) unconstitutional. Please see removal process discussed in S. 8.5.3.4.

<sup>84</sup> Hatchard, Ndulo and Slinn, 'Comparative Constitutionalism and Good Governance in the Commonwealth', 164.

<sup>85</sup> Secretary Ministry of Finance v Masder Hossain (1999) 52 DLR (AD) 82.

<sup>86</sup> Secretary Ministry of Finance v Masder Hossain (1999) 52 DLR (AD) 82.

<sup>87</sup> Shafiqul islam, Nashir Uddin and Abdullah Al-Hossienie, The Independence of the Judiciary in Bangladesh: A New Milestone and its Challenges, *Bangladesh Journal of Public Administration*, 27 (2008) 37.

be if Parliament directly voted on the budget for the Judiciary and from there on the Supreme Court had all control over judicial finances.

#### **8.5.3.4. Removal Proceedings**

The 16<sup>th</sup> amendment to the Constitution was passed in September 2014 and did away with the Supreme Judicial Commission.<sup>88</sup> Until 2014, the Supreme Judicial Commission was in charge of investigating judges for allegations of incapability and misconduct. Since the 16<sup>th</sup> amendment, Parliament can investigate and remove judges for allegations of misconduct and incapability. Hatchard et al write that if removal proceedings ‘are left in the hands of the President, Cabinet or Parliament, it provides a potential weapon through which to intimidate judges and thus create or maintain a pliant judiciary.’<sup>89</sup> Given the strong majority in the Bangladesh Parliament, and the willingness of the legislature to give easy passage to government sponsored Bills, in the context of Bangladesh the 16<sup>th</sup> amendment may be setting very bad precedence and could lead to further weakening of judicial independence. Given the political climate in Bangladesh, retaining the provision for the Supreme Judicial Council or setting up a Judicial Ombudsman would make it more likely that the judiciary could play its role as the guardians of the Constitution. (Since writing the above paragraph, on 5 May 2016 the High Court declared the 16<sup>th</sup> amendment unconstitutional and the Supreme Judicial Commission was reinstated.<sup>90</sup> However, the government is appealing the High Court’s decision.)<sup>91</sup>

#### **8.5.3.5. Protection and Accountability of Judges**

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<sup>88</sup> The Supreme Judicial Commission had constituted of the Chief Justice and the two next most senior judges of the Appellate Division.

<sup>89</sup> Hatchard, Ndulo and Slinn, ‘Comparative Constitutionalism and Good Governance in the Commonwealth’, 171.

<sup>90</sup> ‘HC scraps 16<sup>th</sup> amendment’, *The Daily Star*, 5 May 2016.

<sup>91</sup> ‘HC scraps 16<sup>th</sup> amendment’, *The Daily Star*, 5 May 2016.

In Bangladesh judges are protected from criticism through their ability to resort to contempt of court proceedings.<sup>92</sup> This is important because when hearing contentious cases, particularly in constitutional adjudication, it is very easy for controversial political disputes to enter the judicial arena. If judges face too much criticism or political pressure they may be unduly influenced and therefore have been given the power to invoke contempt of court. Hatchard et al write, 'Unjustified and unreasonable attacks on judicial integrity strikes at the judiciary's constitutional role...it is inimical to the rule of law if political pressure is directed towards the judges by those who have not succeeded in the judicial adjudication or who wish to influence future decisions.'<sup>93</sup> However, what behavior/action/words constitutes of 'contempt of court' is not defined in the Contempt of Court Act 1926 and Bangladeshi courts have used this power liberally.

In 2013, the government attempted to pass the Contempt of Court Act, 2013, that protected journalists and public servants from contempt of court if they published 'objective and unbiased reports' but the Act was struck down by the High Court.<sup>94</sup> The High Court stated that Article 27 guarantees equality before the law and equal protection by the law to all citizens and special protection for journalists and public servants was unconstitutional.<sup>95</sup>

The Contempt of Court Act, 1926 and judicial willingness to resort to the Act has led to fears that genuine citizens' concerns are being suppressed, especially when the courts have been giving statist decisions. In particular, the conviction of Dhaka based British journalist David Bergman, by the International Crimes Tribunal raised concerns that freedom of speech and proper scrutiny of state institutions were being limited by the court's willing to invoke contempt of court even when genuine historical and procedural

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<sup>92</sup> The Contempt of Courts Act, 1926.

<sup>93</sup> Hatchard, Ndulo and Slinn, 'Comparative Constitutionalism and Good Governance in the Commonwealth', 168-169.

<sup>94</sup> 'HC revokes of Contempt of Court Act, *Dhaka Tribune*, 27 September, 2013.

<sup>95</sup> 'HC revokes of Contempt of Court Act, *Dhaka Tribune*, 27 September, 2013.

questions were being asked and concerns expressed.<sup>96</sup> The International Crimes tribunals also drew contempt proceedings against 23 other individuals for expressing concern at a ruling given by the tribunal, but 22 of them were exonerated.<sup>97</sup>

Given the tendency of the Judiciary to resort to contempt of court, even when genuine concerns have been raised, there is need for a method by which to hold the Judiciary accountable. One way to ensure that the Judiciary remains accountable would be to instate a Judicial Code of Ethics. The ideal code of ethics for the Judiciary should be developed by judges in consultation with those in the legal profession, legal academics and civil society. In the case of Bangladesh, the Judicial Service Commission could draft the code (as it constitutes of members with a broad range of backgrounds). A code developed by the Judicial Service Commission is better than providing a statutory code of ethics, because that would run the risk of the executive having too much input on the appropriate conduct for judges and may lead to the harassment of judges.<sup>98</sup> The Judicial Code of Ethics should deal with both the exercise of judicial duties and extra-judicial duties. In particular it should require judges to disclose their assets in order to prevent and check against potential corruption.<sup>99</sup> While most countries do not have a formal procedure for taking disciplinary action for the breach of the code of ethics, it would be useful to have a Judicial Ombudsman in place that overlooks such breaches. The code of ethics should be widely distributed so that people are aware and informed about it.

While it is advisable to have a Judicial Ombudsman in charge of overseeing judicial discipline and breach of ethics, at the same time it is very important to protect judges

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<sup>96</sup> 'Bangladesh court convicts British journalist for doubting war death toll', *The Guardian*, 2 December 2014.

<sup>97</sup> 'ICT-2 serves 23 citizens with contempt of court shoe cause', *New Age*, 1 April 2015.

<sup>98</sup> Hatchard, Ndulo and Slinn, 'Comparative Constitutionalism and Good Governance in the Commonwealth', 167.

<sup>99</sup> Hatchard, Ndulo and Slinn, 'Comparative Constitutionalism and Good Governance in the Commonwealth', 167.

through immunity from prosecution. Article 51 of the Bangladesh Constitution provides constitutional immunity to the President for anything done or omitted in the exercise of his or her duties. However, no such immunity is granted to judges. Hatchard argues that constitutional immunity for acts and omissions in the performance of judicial duty provides invaluable protection to judges and enables them to act impartially, independently and fearlessly.<sup>100</sup> Judges in Bangladesh should be granted constitutional immunity in the exercise of their duties so they do not have to fear that their actions in court will become subject to legal proceedings. Of course such immunity cannot extend to acts undertaken on a personal capacity such as the taking of bribes or other corrupt practice.

Following the above recommendations to its full extent or even to some extent would allow the Bangladeshi Judiciary to act far more independently with regards to its duty as the guardians of the Constitution than has been the case in recent years. Given the political climate in Bangladesh today, with a super-strong majority in Parliament, a weakened and violent opposition, and a suppressed civil society, the Judiciary remains the only way out of the constitutional crisis. Through its powers of judicial review the Judiciary may be able to hold the executive accountable with regards to unscrupulous constitutional amendments that serve political ends. Public Interest Litigation and judicial activism has in the past held Bangladeshi government's accountable and also created awareness amongst the population thereby enabling popular uprisings. Given the political deadlock in Bangladesh today, the Judiciary needs to play its role as the guardian of the Constitution by holding the government accountable and providing a constitutional solution to hold widely accepted, democratic elections. In order to do that,

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<sup>100</sup> Hatchard, 'Combating Corruption', 213-214.

it is necessary to put in place some of the reforms suggested here so that the Judiciary may act more independently.

### *8.6. Summary of Future Reflections*

The final section of the thesis has looked at some possible scenarios that may be the way out of the current political crisis that Bangladesh faces, without leading to the sort of political violence that opposition-led movements have resulted in. The researcher first looked at the role of civil society in bringing about political change and discussed that civil society has mobilized many times in the past in support of democratic elections, has held governments accountable and created a path for free and fair elections and democratic turnovers of power. However, the researcher contends that given the current political climate and suppression of dissent through tactics such as filing of sedition cases, arrests and disappearances it is unlikely that civil society will be able to mobilize in the near future. The researcher then turned to constitutional reform and suggested ways to strengthen the process of constitutional reform so that unscrupulous changes to the Constitution are not possible and the Constitution can provide for institutions and principles that allow the holding of free, fair and participatory elections (the Caretaker Government was one such constitutional solution that an unpopular constitutional amendment did away with). In the face of a strong majority in Parliament that has been acting as a rubber-stamp to pass constitutional amendments that serve the political purpose of the government, the researcher then turned to the final place of refuge for the Constitution and democracy in Bangladesh.

The final paragraphs of this thesis suggested ways that the Judiciary can be strengthened so that it is able to undertake its proper role as the protector of the Constitution. If effective measures are taken to strengthen the Judiciary, then it will be able to actively



take on its role of providing checks and balances to the other arms of government. An independent Judiciary is also the best long-term solution to the trend in Bangladesh to return to unconstitutional modes of rule. A strong and independent Judiciary can provide an enduring institution with the constitutional mandate to uphold the Constitution and hold the executive accountable, through powers of judicial review, the basic structure doctrine and more recently judicial activism as a result of Public Interest Litigation.

## Appendix I

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**Summary of Members' Statements at the 14<sup>th</sup> Meeting of the Special Committee on the 15<sup>th</sup> Amendment held on 29 March 2011. Translations are the author's own. A copy of the minutes of the proceedings is available on file with the author.**

According to the minutes of the 14<sup>th</sup> meeting of the Special Committee on the 15<sup>th</sup> Amendment, the meeting closed with unanimous agreement amongst the members that the Caretaker Government provision should be retained for the 10<sup>th</sup> and 11<sup>th</sup> Parliamentary elections. The following is a summary of what each of the individual members of the committee stated during the 14th meeting, which shows that most members were in favour of retaining the Caretaker Government formula for at least two terms:<sup>101</sup>

Rashed Khan Menon suggested that the chief advisor and board of advisors of the Caretaker Government should be selected after the President had discussed possible options with all political parties. He also suggested the creation of a constitutional council that could select candidates for all constitutional posts (not only for Caretaker Government but chief justice, Chief Election Commissioner, Attorney General, etc.). The ruling party and the opposition, the judiciary and the executive could be involved in the process. Stated that Sri Lanka had implemented a similar provision. When discussing the declaration of state of emergency in 2007 by the Caretaker Government, he suggested that if emergency arises the dissolved parliament can be recalled and they can approve state of emergency. Also emphasised that the President cannot both declare emergency and approve the state of emergency at the same time.

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<sup>101</sup> All translations are the researcher's own.

Anisul Islam Mahmud stated that if the last senior most retired appellate judge had declined the post of chief advisor, this should be formally specified in writing. Also thought that Rashed Khan Menon's suggestion should be the last option because any changes to the Constitution with regards to the Caretaker Government would make the current accountable for the consequences. Stated that to change Chief Justice becoming Caretaker Government head would be politically a bad move even though there is politicisation of judiciary. This is because the Caretaker Government is an accepted concept and any new concept would be unacceptable to the opposition. He further suggested that there may be a committee for constitutional posts but not for selecting the people. Selection would be made by the government, but the committee could confirm or reject that selection. Concluded by stating that there was no need to get rid of the Caretaker Government immediately. He suggested having the Caretaker Government provision in place for two more elections in order to avoid controversy.

Hasanul Haque Inu: Pointed out that the current Caretaker Government provision only states 'power has to be handed over to the next elected government' but does not define the term of the Caretaker Government. He suggested that the term of the Caretaker Government should be defined properly. He suggested that for the sake of democracy the election process should be made mandatory and that the Election Commission should declare the time period for Caretaker Government to be 90 days. At most there should be no extension beyond 6 months. He further suggested that if the judiciary were to be removed from heading the Caretaker Government to save it from politicization, then the head of the Caretaker Government can be selected from amongst ombudsmen. He also suggested that a Constitutional Selection body be created. The PM, the leader of the opposition could be members. It would function as a search committee. He stated, 'we all agree that the Caretaker Government provision should be retained but clarity

should be brought about. The problem is whether the Caretaker Government should be around indefinitely or not. If the provision is kept in place for two more terms then the government will not face any crisis’.

Fazle Rabbi Mia: He was the only member who was against the Caretaker Government method altogether. He said that conducting elections under a non-elected representative does not seem proper for democracy. He further wanted to keep his statement on record so that future generations know that at least someone argued that the Caretaker Government method was not the right one. He stated that City Council elections and elections held in two electoral zones under the current government had been acceptable and therefore he did not see the need for a Caretaker Government. However, he did say that since the opposition would protest if the provision was abolished, for now the option of a Caretaker Government had to be kept. Therefore the constitution should specify the duration of Caretaker Government provision.

Tofayel Ahmed: He pointed to the fact that no member of the opposition was present in the committee and that they were all members of the grand alliance. He went on to suggest that the Caretaker Government should not be in charge of anything major during its term. However, he clearly stated that in his opinion whatever bill was introduced it would be opposed by Bangladesh Nationalist Party and its allies. He said, ‘we will oppose anything they suggest and they will oppose anything we suggest’. He recommended that the 15th amendment should limit the term of the Caretaker Government to 90 days and exclude it from making major decisions during its tenure. He suggested keeping the Caretaker Government in place for the next two election. He further pointed out that, ‘One day we might regret removing the Caretaker Government if elections are held under a Bangladesh Nationalist Party government, hence the Caretaker Government should stay in place. We are the creators and authors

of the Caretaker Government so why do we want to end our creation?’ He questioned why the Caretaker Government should even be limited to 2 terms? His final suggestion was to leave the provision as is..

Amir Hossain Amu: He stated that any change in the Caretaker Government provisions will give rise to complications as the opposition would protest. He suggested keeping the provision as it was but the power of the Caretaker Government could be limited to a maximum term of 90 days. He also pointed out that there might be difficulty in deciding from whom the Caretaker Government would take permission if it needed to extend its term beyond the 90 days. He also expressed confidence that the public believed in the Election Commission and its capacity to hold fair elections. The Caretaker Government could be retained for one more term for the sake of peaceful elections, but there was no long term necessity for it.

Abdul Motin Khosru: Requested that the Caretaker Government policy remain unchanged. He stated that it would be too controversial to make any changes and would give the opposition something to rally around.

Shireen Sharmeen Chowdhury: Stated that there were no changes required to the Caretaker Government policy.

Suronjit Sengupta: Observed that everyone agreed that the Caretaker Government policy should not be changed, so instead the Committee should look into improving on the loopholes. He emphasised that the 15th amendment must limit the Caretaker Government’s ability to use the President’s Ordinance. He referred to the use of Article 93 in 2006 by president Iajuddin and the two-year emergency rule under the Caretaker

Government.<sup>102</sup> He insisted that the constitution should state clearly the time limit of the Caretaker Government. He went on to say that, 'We all agree that in spite of all the limitations of the present system of the Caretaker Government, the conclusion is that it should remain, therefore, we have to reach a consensus regarding correcting its faults'.

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<sup>102</sup> Article 93 gives the President the power to make and promulgate Ordinances when Parliament stands dissolved or not in session.

## Appendix II

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### Interview Extracts on Patronage and Personalized Expectations of Voters

#### Interview V:

##### ORIGINAL:

*"There are also benefits that they get out of being attached to a particular political party, we call it... halwa roti, in very plain language it is called... I mean the favour that you dole out to whoever is a worker. It's very unfortunate to say these things but jaara leader boy... supposing in my constituency, if I have, say, about 25 leaders who I would count as close to me, they would expect that I would give them some facility, either in the form of, say, business, or put their relations somewhere here and there.."*

##### AUTHOR'S TRANSLATION:

*"there are also benefits that they (the clients) get out of being attached to a particular political party, we call it... sweets and bread, in very plain language... I mean the favour that you dole out to whoever is a worker. It's very unfortunate to say these things but those who become leaders... supposing in my constituency, if I have, say, about 25 leaders who I would count as close to me, they would expect that I would give them some facility, either in the form of, say, business, or put their relations somewhere in jobs here and there.."*

#### Interview A7:

##### ORIGINAL:

*"What they want is for us to help their children go to school, the other thing they want is a job. Jemon korei hok amar chele ekta chakri dite hobe. Personal problem niye ashe, chikitsar problem, kajer, ki kore earn korte pare? Government officer access er jonno."*

##### AUTHOR'S TRANSLATION:

*"What they want is for us to help their children go to school, the other thing they want is a job. However, it is done the MP needs to give the son a job. They also come with personal problems, medical problems, work issues, how can they earn? And for help with access to government offices."*

#### Interview J:

##### ORIGINAL:

*"dboro ami akhon MP, peoples expectations from me is sky rocketing. Tara mone kore uni toh montri, amar chele chakri... ajke shokalo bhai amar chele ta porikkha dibe chakri ta diyeden.. toh amar jonno toh shokolor chakri deye shombhob na.. chakri dile bole faruk bhai amar chele ke chakri diyeche take vote ta dibo.. ar chakri na pele.. ha uni chakri dai nai amake.."*

##### AUTHOR'S TRANSLATION:

*"I am an MP now and peoples expectations from me is sky rocketing. They think he is a minister so of course he can give my son a job. Even this morning I was told 'Brother, my son will give the exam please give him the job'. But it is not possible for me to give a job to everyone. If I find them a job they will say 'Faruk bhai gave*

*my son a job so I will vote for him.. and if he doesn't get a job.. they will say I did not give them a job.."*

#### Interview B:

##### ORIGINAL:

*"jamon shob cheye boro kotha amra MP amader dayitto parliament a boshe kaaj kore, to make law, to speak for you..kintu ora eguli care kore na. ora ekta chairmaner jai kaaj gula kora dorkar ora oi ta expect kore... je amra oikhane boshe biye dibo, nari nirjaton mamala korbo, kaar ki churi korlo,ora amake ghum theke uthe dekhite parbe, bichar acher korbo but excuse me I am not supposed to be there, I am supposed to be at the parliament making law.. so you know you can't change it..tumi ai ta change korte parba na..."*

##### AUTHOR'S TRANSLATION:

*"We are MPs so our duty is to work in parliament, to make law, to speak for you.. but they (the voters) don't care about these things. They expect the same things from us as from the local chairman. They expect that we should sit their and give their hands in marriage, that we will resolve domestic violence issues, who stole what, they want to see me as soon as they wake up. But excuse me I am not supposed to be there, I am supposed to be at the parliament making law.. so you know you can't change this... you cannot change this ..."*

#### Interview T:

##### ORIGINAL:

*"One is the personal aspect which is the most important demand – that is job. They want a job. A job for the young boy, mother wants job for the son. This is very important for them. And then as you were mentioning, meyer biye dibe (the daughter's wedding), this is a continuous demand we receive when we go to our respective areas. At the personal level, there are personal needs. Then like medical treatment, the child is not well, he needs to be treated and taken to hospital, they expect that I should be able to arrange for something."*

#### Interview X:

##### ORIGINAL:

*"A candidate should be easily accessible to the poor masses and they must believe and have faith in the candidate, that whenever the voters are in trouble, the candidate will come forward to solve their problems. The problems are varied. Personal problems or forceful occupation of his land, extortion of money, social justice, problems with someone higher in position than the person in distress. The candidate has to render justice. The voters should understand that you are a guardian and once they inform you about problem they should feel relief that they won't be deprived."*

#### Interview H:

##### ORIGINAL:

*"Well, there are several things...jobs for their children or themselves... these are the most important things, but there are little things as well, like personal issues,*



*family issues, dispute settlements, so these issues are also there. People's expectations are very high, they expect that a MP will do everything, but by the Constitution, a MP is a lawmaker actually and he is supposed to present the case of the locality to the Parliament, to the government, things like that, but in our society or in the perspective of the third world country, people's expectations are very high. They feel that their MP would be able to do everything, solve all their problems."*

## Appendix III

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### Extracts of Interviews on Patronage in Formal Institutions of Accountability

During her fieldwork, the researcher found a second set of informal relationships that most observers and interviewees have pointed out. This is the infiltration of informal patronage based relationships between public servants and politicians and also between the judiciary and politicians – in other words the politicization of the civil service and the judiciary. The executive has consistently been accused of patronage appointments within institutions of accountability, which has led to the politicization of electoral reform and implementation of electoral laws. Some authors who highlight the politicization of public institutions are Rehman Sobhan (2004), Muhammad Mohabbat Khan (2003), Ferdous Jahan (2006), Zafrullah (2001), Sarkar (2004), Moazzem Hossain (2006), Rounaq Jahan (2003), Nizam Ahmed (2003) and Badiul Alam Majumder (2006) to name a few (Please see literature review). During interviews, this author was also often told of the increasing politicization of institutions of accountability and the partisan use of institutions such as the EC and the Judiciary. For example:

#### Interview Q:

*‘The main problem that Bangladesh is facing today is the failure of the separation of powers and each institution is functioning in a way to make the executive stronger. When you talk about constitutional organs, each of the organs have become damaged. The legislature is failing because of parliamentary boycotts. Not only is the government able to pass any law because of the majoritarian system, they also do not have to face any questioning or criticisms of the law in parliament from the opposition thereby giving the executive more power. The judiciary is damaged because of the appointment process, and more and more judges are being recruited on partisan lines. This also means that the judiciary is becoming partisan and pro-government. As for the executive itself, decision making is so centralized and within the hands of party leaders that whatever the leader says goes. So when power becomes so concentrated within one branch – the executive – and even more so within the leadership of that branch, it is very damaging for democracy.’*

#### Interview Y:

*‘All institutions are politicized. Even say Supreme Court Bar association or Dhaka University.’*

#### Interview A4:

*‘The problem is even if you set up a selection commission for the EC – the selection commission will be partisan. Because everyone is getting something out of someone.’*

#### Interview A14:

*‘On paper we have got an independent EC. But the people who are running the EC, we have consistently and deliberately appointed people who do not have the correct mind set. Actually they themselves do not appreciate the strength and the power that has been vested upon them.’*

**Oli Ahmed, President, Liberal Democratic Party, Member of 9<sup>th</sup> Parliament:**

*'The EC itself is under the direct control of the government in power. So they have to act on the advise of the government. Political people are appointed as EC Commissioners or secretary. EC should be strengthened, accountable and must be a final authority to declare someone elected and also for any result relating to election result. It should not be referred to the Supreme court. From my experience I can say that the Supreme Court takes 4-5 years to give a verdict and most of the time it is motivated. 80% of judges are appointed from the 3 big political parties (AL, BNP, Jamaat).'*

## Appendix IV

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### Excerpts From Interviews about the Appointment Process of Election Commissioners

#### Interview A11:

*For making a good EC the most important thing you need to do is to find out the appropriate people to be Commissioners..... But here as far as the appointment to the EC is concerned, in fact as far as appointment to head any constitutional body is concerned, it is up to one person.'*

*'The separation of the ECS became meaningless because the members of the BEC would like to do the bidding of the government. The civil society wanted separation of the ECS on the assumption that the BEC wants to do independent work. So the crucial factor is what the commissioners want to do. So, if the BEC does not want to act independently it is irrelevant whether the secretariat is separated or not.'*

#### Interview A14:

*'On paper we have got an independent election commission. But the people who are running the election commission we have consistently and deliberately appointed the people who do not have that mindset. Actually they themselves are not appreciating the strength and the power that has been vested upon them. Because while we are making a choice whom we are appointing the election commission, it is up to the... president appoints him but because of our current constitutional framework president is bound by the advice of the PM. The way the process of appointment of election commission actually works, is that it is being appointed by the president but because of Article 54, Article 54 says that president is bound by the advice given by the PM, so if PM is sending some recommendation which advise you please go ahead and appoint XYZ as the election commissioner, then president is bound to appoint that. So although president is the appointing authority but virtually president has no power to make his own choice because he is always bound by the choice made by the PM'.*

#### Interview A10:

*'Previous ECs could not make changes because of political interference by all the parties. So any substantial change they wanted to bring, the political parties, whether in power or opposition, they resisted'.*

#### Interview A4:

*'It is not that the Election Commissioners aren't strong, but they weren't allowed to function by party government's. They were all successful under the CTG.'* –

*'The independence of the BEC really depends on how much the election commissioners can resist pressure from the 2 political parties' – Rishi Datta, Head of the National Democratic Institute, Bangladesh Chapter.*

#### Interview X:

*First we have to ensure that the reputed people of the society who were never involved directly with any political party should be appointed in all key positions of the BEC. Besides, they should also have their own separate budget, that means they should not be dependent for anything on the government in power. The BEC is currently not fool proof. These things are still happening. These issues have to be addressed'.*

## Appendix V

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### Patronage and Distribution of State resources: Excerpts from Interview T

*T: First voters expect the personal aspect, which is the most important demand – that is job. They want a job. A job for the young boy, mother wants job for the son. This is very important for them. And then as you were mentioning, meyer biye dibe, this is a continuous demand we receive when we go to our respective areas. At the personal level, there are personal needs. Then like medical treatment, the child is not well, he needs to be treated and taken to hospital, they expect that I should be able to arrange for something.*

*AK: so a variety of very private, very small amounts of request that they require from their MP?*

*T: So these are the personal level, great demands you have to meet. Then comes the combined, collective demands. Mostly the demand is the road, construction, or reconstruction of road, or raastar shonkshkar, bridges and culverts, in many areas still people don't have access to main roads. There is tremendous infrastructure development but still there are areas that don't have access as far as communication is concerned. Local development demands, how much resource can the MP gather from the government for those demands.*

*The third demand is from the landless. So the government land is allocated. There are many kinds of land, like railway has a lot of land, roads and highways, water board..*

*AK: So whose authority is it to distribute the land? Does the MP have this authority?*

*T: The MP can recommend. And there are some khash jomi, directly under the control of the government, chor a land uthe. To ai jomi gulo government distributes. So this is the social aspect, some collective demand for local development.*

*AK: How do they make these demands to the MP?*

MA: Well MPs have to regularly visit their areas. No MP can afford to be away. Very few, those who do national level politics perhaps. But most of the MPs they stay with their people in the areas. Suppose there is a storm or a cyclone there the people expect the MPs to be with them at the time of their distress.

AK: Do the groups that campaigned for the opposition get neglected?

T: Let us just assume hypothetically that BNP has 30% voters who will blindly vote BNP, 30% who will vote AL, so in the middle we have another 40%. They actually decide the fate of the election. And they actually really judge whether they got what they expected, or how much they got from a particular government because you know for no government it isn't possible to meet all the demands of all the people. Poor economy, poor country, the other great demand is educational demands, primary schools, so the demand for school, for bityut... so jai point ta bolchilam, so for no government it would be possible to meet all the demands of the people. So some people are always neglected. It is only those who are very close to the party hierarchy or the party leaders or those in party positions.. they get the maximum benefit, directly or indirectly. For example, when a quantum of rice goes to an area for distribution, normally the party in power they give it not to the ordinary people but to their own workers, or to the people they know give them strong support. But the rest are neglected. You know in area there is never sufficient amount. It doesn't matter how fairly you distribute, some people will get neglected. And naturally they think this time I did not vote BNP because BNP did not give me anything, now AL is not giving me anything I will vote BNP again.

AK: So do you think these voters feel compelled to join one of the political party factions because otherwise they have no access to resource?

T: One of the reasons. You know in rural areas there is tremendous competition, at the grass roots level for party leadership. This applied to both BNP and AL, if you see that if we give a ward level election, 31 member committee hobe, there will be

*tremendous amount of competition, this will give him importance socially and politically, and if his party goes to power he will have some advantage as a local leader.*

*AK: Do you think that the level of competition before elections, the electoral violence that Bangladesh experiences because of the conflict between the two major political parties, is in any way related to this, because of the absolute necessity to control state resource and therefore elections become... to be the incumbent in this sort of society because the opposition loses so much voice without access to these public resources?*

*T: Right, and that is why also the opposition gives the support so there is anti-government or the anti-incumbent feeling is there, and so indirectly it is supporting the opposition because the more people are neglected by the ruling party, the more support the opposition gets.*

*AK: And so every time we're having the opposition become the incumbent, alternating?*

*T: Exactly, one of the reasons. And at the macro level, at the national level, we have these things actually don't affect the common people at the grassroots level. Padma bridge er bepar bah oije Parliament e gelam ki na gelam, bah Parliament-e ki bill paash holo na paash holo, eta na...*



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## INTERVIEWS

**Interviewee A:** Educationist and Author: Interviewed on 1 February 2015.

**Interviewee B:** Senior member of Jatiyo Party-Partho, Member of Parliament: Interviewed on 11 March 2012.

**Interviewee C:** Minister since 2014, Member of Parliament, senior member of Jatiyo Party-Manju, Editor and Publisher: Interviewed on 17 March 2012.

**Interviewee D:** Local level Election Commission Employee, Murad Nagar, Comilla: Interviewed on 22 December 2014.

**Interviewee E:** Supreme Court Lawyer: Interviewed on 2 June 2015 (via email).

**Interviewee F:** Senior member of SHUJAN: Interviewed on 22 October 2013 and 11 August 2014.

**Interviewee G:** Distinguished Fellow, Centre for Policy Dialogue, 18 November 2011.

**Interviewee H:** Member of Parliament: Interviewed on 12 February, 2014.

**Interviewee I:** Independent Member of Parliament 2009-2014: Interviewed on 9 April 2014.

**Interviewee J:** Member of Parliament, Minister 2009-2012: Interviewed on 19 November 2011.

**Interviewee K:** Senior member of the Jatiyo Samajtatrik Dal, Member of Special Committee on the 15<sup>th</sup> amendment, Minister since 2014, Member of Parliament from: Interviewed on 9 March 2014..

**Interviewee L:** Senior member of Martial Law Regime between 1983-1990, Senior member of Jatiyo Party: Interviewed on 28 July 2012.

**Interview M:** Supreme Court Lawyer: Interviewed on 20 November 2011.

**Interview N:** Supreme Court Lawyer, Minister of Law, Senior member of Gano Forum and Transparency International Bangladesh, Member of the Bangladesh Constitution Drafting Committee: Interviewed on 29 September 2013, 20 December 2013 and 10 November 2014.

**Interview O:** Senior member of the Election Commission: Interviewed on 14 August 2014.

**Interview P:** Social Worker, Nijera Kori: Interviewed on 29 September 2013.

**Interviewee Q:** Editor: Interviewed on 2 May 2014.

**Interviewee R:** Local level Election Commission Official, Comilla Shadar: Interviewed on 22 December 2014.

**Interviewee S:** Local level Election Commission Official, Comilla Shadar: Interviewed on 22 December 2014.

**Interviewee T:** Supreme Court Lawyer, Member of the Bangladesh Nationalist Party Standing Committee, Member of Parliament, Minister of Law and Parliamentary Affairs, Author: Interviewed on 30 July 2012.

**Interviewee U:** Senior member of Fair Election Monitoring Agency: Interviewed on 11 September 2014.

**Interviewee V:** Supreme Court Lawyer, Past President of the Supreme Court Bar Association, Senior Member of the Bangladesh Nationalist Party, Past member of Bangladesh Nationalist Party Standing Committee, Minister: Interviewed on 28 March 2013.

**Interviewee W:** Senior Member, National Democratic Institute: Interviewed on 4 May 2014.

**Interviewee X:** Member of Parliament, Retired Colonel of the Bangladesh Army: Interviewed on 27 March 2013.

**Interviewee Y:** Supreme Court Lawyer: Interviewed on 8 May 2014.

**Interviewee Z:** Senior Member Liberal Democratic Party, Member of Parliament, Awarded Bir Bikram for his role in the 1971 war against Pakistan, Former Colonel of the Bangladesh Army: Interviewed on 13 December 2012.

**Interviewee A1:** Supreme Court Lawyer: Interviewed on 20 April 2015.

**Interviewee A2:** Local level Election Commission officer, Comilla Shadar: Interviewed on 22 December 2014.

**Interviewee A3:** Senior employee, National Democratic Institute: Interviewed on 4 May 2014.

**Interviewee A4:** Supreme Court Lawyer: Interviewed on 10 May 2014.

**Interviewee A5:** Enumerator for the Election Commission, Assistant Teacher at a Government Primary School, Comilla Shadar: Interviewed on 22 December 2014.

**Interviewee A6,** Distinguished Fellow at the Centre for Policy Dialogue, Author, Educationist: Interviewed on 1 May 2014.

**Interviewee A7:** Member of Parliament, Senior position holder at the Jatiyo Sangshad, Former Secretary-General of the Awami League, Presidium Member of the Awami League: Interviewed on 22 January 2013.

**Interviewee A8:** Supreme Court Lawyer, Senior member of Bangladesh Legal Aid and Services Trust: Interviewed on 29 September 2013.

**Interviewee A9:** Former Bangladesh Ambassador and Election Observer for the Commonwealth Observer Group: Interviewed on 23 April 2014.

**Interviewee A10:** Former Election Commissioner: Interviewed on 23 April 2014.

**Interviewee A11**, Former Election Commissioner: Interviewed on 28 June 2014.

**Interviewee A12**: Supreme Court Lawyer: Interviewed on 20 April 2015.

**Interviewee A13**: Advisor, Bangladesh Caretaker Government: Interviewed on 23 April 2014.

**Interviewee A14**: Supreme Court Lawyer: Interviewed on 19 November 2011.